

State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System

Report on the American Convention on Human Rights

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Executive summary

This report outlines the nature and scope of states' obligations vis-à-vis corporate activities in the Inter-American System of Human Rights, as elaborated by the Inter-American Commission on Human Rights (Commission) and the Inter-American Court of Human Rights (Court).

Overall, the research uncovered acknowledgment by the Commission and the Court of the link between human rights violations and the activities of public and private enterprises. The regional system has explored the state's role in preventing abuse in a wide range of industries, including the mining, oil, construction and logging sectors.

Part I. Duty to protect and due diligence

Under articles 1.1 and 2 of the American Convention on Human Rights (Convention), states parties must respect and enforce respect of human rights to all individuals under their jurisdiction without discrimination.

Special duties for states derive from these general obligations which are ascertainable on the basis of the protection needed by the individual who is the right holder. These special duties are due diligence and duty to prevent, the duty to investigate and the duty to provide access to redress for violations of human rights. Thus both the Commission and the Court have determined that states shall be responsible for acts of private persons or groups, when these non-state actors act freely and with impunity to the detriment of rights – in other words, where the state has failed to act with due diligence to prevent such violations. The Court has suggested that this means that states have the duty to take reasonable steps to prevent human rights violations by non-state actors.

Part II. References to business enterprises

The Commission has adopted several decisions in which a violation of rights in the Convention was related to business operations. The Commission has discussed state responsibility for business abuse in its individual cases, precautionary measures and country reports. Regarding the analysis of individual cases, the issue has been raised mainly in cases related to violations of indigenous peoples' rights. Concerning precautionary measures, state responsibility has been addressed when the state has failed to act to prevent business activities which threaten the right to life and personal integrity in some way dependent upon one's physical environment. Finally, references to business enterprises in country reports emphasize specific measures that a state must adopt to limit the impact of company operations on human rights.

On the other hand, the Court's jurisprudence does not show extensive or comprehensive references regarding state responsibilities for business operations. The issue has also not been analyzed through an advisory opinion. Nevertheless, the Court has ordered provisional measures be taken to ensure that states protect human rights threatened by business operations.

Part III. Regulation and adjudication

The Commission and the Court have developed concrete examples of what states should do to regulate and adjudicate company activities as part of the duty to protect.

Such examples are based on the relevant provisions in the Convention. For instance, regulation is enshrined in article 2 of the Convention, which compels states to take the necessary steps to adopt legislative and other measures that might be necessary to give effect to the Convention rights. Adjudication is enshrined in article 25 of the Convention, which requires states to ensure the right to simple and prompt recourse.

Part IV. Regulating with extraterritorial effect

States parties' obligations under the Convention apply to respect and ensure respect for the rights of individuals within their jurisdiction. To date the Inter-American System has not referred to the use of extraterritorial regulation to prevent overseas abuse by corporations based in a state party.

Part V. Trends and issues which would benefit from further elaboration

The regional system has developed some notable considerations with regard to business and human rights. For instance, the regional system has adopted an interesting approach to the concept of social license to operate which is a key issue in the field of business and human rights. Both the Commission and the Court have stated that it is mandatory for states to ensure consultation with indigenous peoples before authorizing the exploration and exploitation of natural resources. The institutions are less consistent on whether the consent of such peoples must be obtained. Further guidance from the Commission and the Court would be useful on this issue specifically, as well as on the role of states parties in ensuring companies secure a social license to operate based on a human rights approach.

Among the areas that could benefit from further elaboration in the Inter-American system, this report outlines the following topics: the significance of the *erga omnes* concept for both the state duty to protect and any responsibilities for business; the scope of required due diligence to fulfill the state duty to protect against corporate abuse; and the extraterritorial dimensions, if any, of the state duty to protect.

This report also suggests further consideration of the following topics: the need to interpret human rights instruments in light of broader developments in international law; the concept of *corpus juris* when addressing the issue of state responsibilities for business operations; and protection of economic, social and cultural rights regarding business operations.

Part VI. Procedural recommendations

This report outlines some procedural recommendations that could contribute to a more in-depth focus on the issue of business and human rights within the Organization of American States, especially within the Commission and the Court. For instance, a more active interaction between both the Court and the Commission and companies, such as through an invitation by the Commission inviting companies to attend its promotional activities. Finally, the report also suggests a more proactive approach by the Commission and the Court where possible on this issue, including through an advisory opinion from the Court interpreting the state duty to protect and due diligence in relation to business activities.

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Abbreviations

ACHR	American Convention on Human Rights
ADRDM	American Declaration on the Rights and Duties of the Man
EIA	Environmental Impact Assessment
IACHR	Inter-American Commission on Human Rights
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OIT	International Labour Organization
UDHR	Universal Declaration of Human Rights
UN	United Nations

Introduction

This report maps the scope and content of states parties' responsibilities to regulate and adjudicate business activities under the American Convention on Human Rights (Convention).

The mapping of states parties' obligations under the Convention was undertaken to assist the Special Representative of the UN Secretary General (SRSG) on Business and Human Rights, Professor John Ruggie, in implementing sub-paragraph (b) of his mandate to "elaborate on the role of States in effectively regulating and adjudicating" the activities of business enterprises with regard to human rights.²

The report is intended to build on information gained by the SRSG through a series of reports examining states' obligations in relation to corporate activity under the United Nations' core human rights treaties.³ Each report in that series mapped the scope and content of states parties' responsibilities to regulate and adjudicate the actions of business enterprises under a particular treaty, drawing on commentaries from the relevant treaty body as appropriate. As this mapping series only looked at the UN system, the SRSG thought it necessary to examine trends more closely in regional human rights systems and thus requested the author to look at the Inter-American system in more detail.

This report is based on references by the Inter-American Commission on Human Rights (Commission) and the Inter-American Court of Human Rights (Court) to states parties' duties to regulate and adjudicate corporate activities.⁴ However, as the Inter-American System has referred to corporations in few situations, the report also outlines more general references to state obligations regarding non-state actors which can be helpful to identify patterns that could be relevant to corporations. Furthermore, the report focuses on states' obligations to rights impacted by corporate activities, rather than on corporate entities as possible rights-holders.

A snapshot of the Inter-American System of Human Rights

The Inter-American System of Human Rights is a regional system created within the Organization of American States (OAS).⁵ This international organization has 35 Member States⁶ not all of whom have ratified the Convention. States which are OAS members but which have not ratified the Convention are only bound by the American Declaration of the Rights and Duties of Man (ADRDM). The Court has confirmed that although this Declaration is not a treaty, it is "a source of international obligations for the member

² Commission on Human Rights resolution 2005/69.

³ See [Addendum 1 to the SRSG's 2007 report](#): State responsibilities to regulate and adjudicate corporate activities under the United Nations' core human rights treaties: an overview of treaty body commentaries. (A/HRC/4/35/Add.1)

⁴ Drawing on the SRSG's mandate, the report uses "regulation" to refer to language recommending legislative or other measures designed to prevent or monitor abuse by business enterprises, and "adjudication" to refer to judicial or other measures to punish or remediate abuse.

⁵ For further information on the Organization of American States visit its web site at www.oas.org.

⁶ Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (By resolution of the Eight Meeting of Consultation of Ministers of Foreign Affairs (1962) the current Government of Cuba is excluded from participation in the OAS), Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay and Venezuela <http://www.oas.org/documents/eng/memberstates.asp>

states of the OAS.⁷ For the states parties to the Convention, the specific source of their obligations with respect to human rights is, in principle, the Convention itself.⁸

As outlined above, the regional system has two main organs which are: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.⁹

The Commission is an autonomous organ of the Organization of American States.¹⁰ Its mandate is based in article 106 of the OAS Charter, the Convention and its Statute. The Commission promotes human rights in all of the OAS member states. Its seven members act independently, without representing any particular country.¹¹ The Commission's headquarters are in Washington D.C., and the Court sits in San José, Costa Rica.

It is important to observe that while any person, group of persons or non governmental organization legally recognized in any of the OAS Member states can file a petition or a request for precautionary measures to the Commission¹², only states and the Commission itself can submit a case or a request for provisional measures to the Court.¹³

The Commission's functions are defined in articles 41 to 43 of the Convention. Articles 44 to 51 set forth the procedure for individual petitions and interstate communications.¹⁴ The Commission can provide decisions on individual cases, precautionary measures and country reports, among others. The Commission shall adopt precautionary measures when there is a situation of gravity and urgency involving irreparable harm to persons.¹⁵ The Commission's decisions are only recommendations to states and are not legally binding.

⁷ INTER-AMERICAN COURT OF HUMAN RIGHTS, Interpretation of the American Declaration of the 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, Number 10, paragraph 42.

⁸ There are other Inter-American treaties on human rights that can be reviewed at <http://www.cidh.org/Basicos/English/Basic.TOC.htm>.

⁹ Article 33 of the American Convention on Human Rights "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: a. the Inter-American Commission on Human Rights, referred to as "The Commission;" and b. the Inter-American Court of Human Rights, referred to as "The Court."

¹⁰ OAS Charter, adopted in 1948, article 106 "There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters."

¹¹ For further details visit <http://www.cidh.org/what.htm>

¹² American Convention on Human Rights, article 44 "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

¹³ American Convention on Human Rights, article 61

¹⁴ See also Rules and Procedure of the Inter-American Commission on Human Rights.

¹⁵ Rules of Procedure of the Inter-American Commission on Human Rights, article 25.

The Court was created by the Convention and is the only jurisdictional organ within the system. The Court exercises adjudicatory and advisory jurisdiction. It has seven judges who are independent individuals not representing any particular country. The structure, functions and organization of the Court are provided for in articles 52 to 69 of the Convention. For example, the Court renders judgments, advisory opinions and provisional measures. In general, judgments determine whether a state is or not responsible for an alleged human rights violation and provide orders and guidance as to what should happen next. Advisory opinions interpret the Convention and other human rights treaties ratified by the OAS member states. Provisional measures are adopted to avoid irreparable harm to individuals when a situation of extreme gravity and urgency appears¹⁶. The Court's decisions are legally binding.

Please refer to the reports of the Commission¹⁷ and the jurisprudence of the Court¹⁸ for further detail on specific issues. All of the considerations and recommendations expressed in this report are made in the personal capacity of the author.

Methodology

The report analyzes decisions of the Commission and jurisprudence of the Court.

Regarding the Commission, this report includes reports on individual cases, precautionary measures and country reports. The analysis of the Court's jurisprudence focuses on judgments on the merits, advisory opinions and orders of provisional measures. This report is based on primary sources published by the Commission and the Court on their web sites.

Due to time and resource constraints, the research examines only relevant Commission and Court materials through the beginning of April 2008, and it does not cover all Annual Reports of the Commission or of the Court.¹⁹

Part I. Duty to protect and due diligence

1.1. Articles 1.1 and 2 of the Convention

Article 1. Obligation to Respect Rights

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

¹⁶ American Convention on Human Rights, article 63 “2. regarding provisional measures.

¹⁷ For further information on the Inter-American Commission on Human Rights visit its web site at www.cidh.org.

¹⁸ For further information on the Inter-American Court of Human Rights visit its web site at www.corteidh.or.cr.

¹⁹ To analyze precautionary measures granted by the Commission, the author reviewed the Annual Reports between 1997 and 2006.

Article 2. Domestic Legal Effects

“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.”

Article 1.1 outlines states parties’ duties which are in nature *erga omnes*, to respect and enforce respect of human rights to all individuals under their jurisdiction without discrimination. It is important to note the use of the term “jurisdiction,” instead of “territory,” as the former holds a broader meaning under international law.²⁰ Article 2 establishes the duty to adopt legislative and other measures to give effect to the rights embodied in the Convention.

In relation to the scope and content of the general duties outlined in article 1.1, the Court states in the Case of Velazquez Rodriguez:

“Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.^{21”}

The Court views article 1(1) as a threshold provision which can only be violated in conjunction with another article that enshrines a specific human right.²² Consequently, where another provision is violated it is also likely that article 1(1) has been violated if there has been a failure to respect or ensure respect for rights.²³

The Court has derived states parties’ special duties from the above mentioned general obligations which are ascertainable on the basis of the protection needed by the individual who is the right holder, either on account of his personal situation or of the specific circumstances pertinent thereto. These special duties are due diligence and duty to prevent, the duty to investigate and the duty to provide access to redress for human rights violations.

²⁰ The use of the term jurisdiction means that a state must ensure human rights even outside its territory provided the relevant individuals are within its jurisdiction. CARREAU, Dominique, *Droit international*, 7^{ème}, Paris, 2001, pp.331 – 347.

²¹ Velazquez Rodriguez v. Honduras, judgment on the merits, 29 July 1988, Series C Number 4. Also see Godínez Cruz v. Honduras, judgment on the merits, 20 January 1989, Series C Number 3 paragraph 164

²² INTER-AMERICAN COURT OF HUMAN RIGHTS Case of Neira Alegria et al. vs. Peru, Merits, Judgment of January 19, 1995, Series C, Number 20. See also Case of Blake v. Guatemala , merits Judgment of January 14, 1988, Series C, Number 36

²³ The Court has declared that article 1 “specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated.” (*Velásquez Rodríguez Case, supra* 63, para. 162; *Godínez Cruz Case, supra* 63, para. 171.)”

1.1.1 Duty to prevent, due diligence and responsibility of “third parties and non State actors” within the Inter-American System

The concept of “due diligence” is frequently mentioned in relation to the duty to prevent human rights violations. It appears in the first case submitted to the Court, which states, “an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.²⁴”

In the *19 Tradesmen v Colombia*, concerning State responsibility regarding a massacre perpetrated by non state actors, the Court declared:

“141. In order to establish that a violation of the rights embodied in the Convention has occurred, it is not necessary to determine, as it is under domestic criminal law, the guilt of the perpetrators or their intention, nor is it necessary to identify individually the agents to whom the violations are attributed. It is sufficient to demonstrate that public authorities have supported or tolerated the violation of the rights established in the Convention.²⁵”

Furthermore, in *The Rochela v Colombia*, the Court made the following considerations:

“68. (...) it is sufficient to prove that public officials have provided support to or shown tolerance for the violation of rights enshrined by the Convention,²⁶ that their omissions have enabled the commission of such violations, or that the State has failed to comply with any of its duties.²⁷”

For the state to fulfill its duties, it must take reasonable steps to prevent human rights violations by both state and non-state actors, as outlined by the Court. The Court has stated that “this duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they

²⁴ INTER-AMERICAN COURT OF HUMAN RIGHTS *Velazquez Rodriguez v. Honduras*, judgment on the merits, July, 29 1988, Series C Number 4. Also see *Godínez Cruz v. Honduras*, judgment on the merits, January, 20 1989, Series C Number 3 paragraph 172. See also *Case of Bamaca-Velázquez vs. Guatemala*, Merits, judgment of November 25, 2000, Series C, Number 70, paragraph 210.

²⁵ INTER-AMERICAN COURT OF HUMAN RIGHTS *Case of the 19 Tradesmen v Colombia*, Merits, Reparations and Cost, judgment of July 3, 2004, Series C, Number 109.

²⁶ See also INTER-AMERICAN COURT OF HUMAN RIGHTS *Case of the 19 Tradesmen*. Judgment of July 5, 2004. Series C No. 109, paragraph 141. In the same sense, cf. *Case of Cantos*. Judgment of November 28, 2002. Series C No. 97, paragraph. 28; and *Case of Hilaire, Constantine and Benjamin et al*. Judgment of June 21, 2002. Series C No. 94, paragraph 66.

²⁷ See also INTER-AMERICAN COURT OF HUMAN RIGHTS *Case of Pueblo Bello Massacre*, Merits, Reparations and Cost, Judgment of January 31, 2006, Series C No 40, paragraph. 112; *Case of the Mapiripán Massacre*, Merits, Reparations and Cost, Judgment of September 15, 2005, , Series C No 134, paragraph 110; and *Case of the 19 Tradesmen*, supra note 30, paragraph 141.

vary with the law and the conditions of each State Party.²⁸” Furthermore, the Court has recently stated that “when related to the essential jurisdiction of the supervision and regulation of rendering the services of public interest, such as health, by private or public entities (as is the case of a private hospital), the state responsibility is generated by the omission of the duty to supervise the rendering of the public service to protect the mentioned right.²⁹”

Importantly, most of the decisions in the Inter-American System discussing the concept of due diligence and the state duty to protect focus on the activities of paramilitary groups. However, some jurisprudence does discuss due diligence and business activities, suggesting that the concept applies equally to protecting against corporate abuse.

The Commission deals with the issue of state duties in relation to corporate activities more frequently than the Court does. Nevertheless, the Court has stated that the state duty to protect includes the responsibility to prevent human rights abuses by private actors, third parties³⁰ or non-state actors. This issue has been raised in different cases of human rights violations (forced disappearances, massacres, among others) where non-state actors were involved in the perpetration of those crimes. The Court has used the term “third parties”, “private individuals”, “private persons”, and “private groups” when discussing non-state actors. It has not used the term “companies” or similar terms, even in a provisional measure concerning the protection of indigenous peoples in Ecuador, where business activities were clearly controversial. However, in this same provisional measure, Judge Antônio Cançado Trindade provides his own opinion, stating that the *erga omnes* nature of the obligations requires protection from all possible abuse, including by corporations.³¹

It is clear that the Court recognizes a role for states with regard to due diligence, to prevent abuse by private parties, which, as one judge has explicitly noted includes corporations.

Therefore it appears that under the Convention the Court would find a state party responsible for a human rights violation perpetrated by a third party if the state failed to prevent, supported or showed support for the violation.³² A thorough examination of the conditions facilitating an act or omission that harms one or more of the rights embodied

²⁸ INTER-AMERICAN COURT OF HUMAN RIGHTS Velazquez Rodriguez v. Honduras, judgment on the merits, July 29 1988, Series C Number 4. Also see Godínez Cruz v. Honduras, judgment on the merits, January, 20 1989, Series C Number 3 paragraph 175. Case of Paniagua Morales v. Guatemala, merits, judgment of March 8, 1998, Series C Number 37, paragraph 174.

²⁹ INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of Albán Cornejo v. Ecuador, Merits, reparations and costs, judgment of November 22, 2007, Series C, number 171, paragraph 119.

³⁰ INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of the Saramaka people v Suriname, Preliminary objection, merits, reparations and costs, Judgment of November 28, 2007, Series C Number 172, operative paragraph 5.

³¹ INTER-AMERICAN COURT OF HUMAN RIGHTS, Matter of Pueblo indígena de Sarayaku regarding Ecuador., June 17, 2005, Opinion judge Cançado Trindade, paragraph 20. See Part V for a detailed discussion of the concept of *erga omnes*.

³² INTER-AMERICAN COURT OF HUMAN RIGHTS Case of Paniagua Morales v. Guatemala, merits, judgment of March 8, 1998, Series C Number 37, paragraph 94. INTER-AMERICAN COURT OF HUMAN RIGHTS Case of the Rochela Massacre vs. Colombia, Merits, Reparation and Costs, Judgment of May 7, 2007, Series C, Number 163.

in the Convention is required to determine if the state has failed to perform proper due diligence.³³

1.1.2. Duty to investigate

States parties are compelled to investigate every situation that indicates a human rights violation. The Court has declared that if “the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.³⁴” (Emphasis added)

The Court has stressed the importance of states investigating human rights violations, clearly establishing, “it is the responsibility of the State to conduct serious judicial investigations into human rights violations committed on its territory and not the responsibility of private persons.³⁵” Moreover, the Court has specified that in order to investigate and fight against impunity states should use all legal means at its disposal.³⁶

1.1.3. Duty to redress

The Court has emphasized that under international law states must provide access to redress to victims of human rights violations. It has recognized the right to access to redress for material damage, non-pecuniary damage and for damage to a victim's life plan.³⁷ It is still rare to see explicit references to the duty to provide access to redress for damage caused by corporations. Nonetheless, the Court has referred to the duty in relation to situations likely to involve corporate entities. For example, it has said that states parties should deny authorization to any operation in indigenous lands until those lands are properly demarcated.³⁸ The implication is that states should take steps to prevent and redress situations where corporate abuse could unduly affect the rights of individuals.

³³ INTER-AMERICAN COURT OF HUMAN RIGHTS Case of the 19 Tradesmen v Colombia, Merits, Reparations and Cost, judgment of July 3, 2004, Series C, Number 109 paragraphs 139 to 141.

³⁴ INTER-AMERICAN COURT OF HUMAN RIGHTS Velazquez Rodriguez v. Honduras, judgment on the merits, 29 July 1988, Series C Number 4. Also see Godínez Cruz v. Honduras, judgment on the merits, January, 20 1989, Series C Number 3 paragraph 176

³⁵ INTER-AMERICAN COURT OF HUMAN RIGHTS Case of Blake v. Guatemala, merits Judgment of January 14, 1988, Series C Number 36, paragraph 92. Case of Loayza Tamayo v. Peru, reparation and cost, judgment of November 27, 1998, Series C Number 42, paragraph 170.

³⁶ INTER-AMERICAN COURT OF HUMAN RIGHTS Case of Loayza Tamayo v. Peru, reparation and cost, judgment of November 27, 1998, Series C Number 42, paragraph 170

³⁷ The Inter-American Court has determined that a victim's life plan is “akin to the concept of personal fulfillment which in turn is based on the options that an individual may have for leading his life an achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation of and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value; hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.” INTER-AMERICAN COURT OF HUMAN RIGHTS Case of Loayza Tamayo v. Peru, reparation and cost, judgment of November 27, 1998, Series C Number 42, paragraph 148.

³⁸ See Case of Mayagna (Sumo) Awas Tingni v. Nicaragua, Merits, Reparations and Costs.

Part II. References to business enterprises

This section analyses relevant decisions of the Commission and jurisprudence of the Court regarding the state duty to protect in relation to business operations.

2.1. DECISIONS ADOPTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Commission has adopted several decisions in which a state violation of rights in the American Convention was related to business operations. The Commission has discussed state responsibility for business abuse in its individual cases, precautionary measures and country reports.

Regarding the analysis of individual cases³⁹, the issue has been raised mainly in cases related to violations of indigenous peoples' rights by third parties.

Concerning precautionary measures, the impact of business operations on human rights generating states' responsibility has been addressed when the activities of enterprises have threatened the right to life and the right to personal integrity relating to the physical environment. Where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.

Finally, references to business operations in country reports detail specific measures that a state must adopt to limit the impact of company operations on human rights abuses.

Set out below is more detail on the Commission's dealings with state responsibility and business activities with respect to human rights.

³⁹ Article 44 of the American Convention on Human Rights provides "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party". See also article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights".

1. Reports on individual cases

After reviewing the individual cases filed with the Commission during the last 22 years, starting with the Yanomani case, there are some interesting trends with regards to business and human rights. Since 1998, there has been a significant increase in the number of cases filed with the Commission regarding state responsibilities and business activities. Questions regarding states and business activities that have been filed have broadened considerably. Decisions adopted from 1985 to 2004 mainly focused on the state duty to protect or states' due diligence regarding business activities that threatened or violated indigenous peoples' right to land.⁴⁰ But since 2004, questions filed with the Commission regarding business activities and human rights have expanded to include new topics, including the rights of the child, and other economic or social rights. In the cases of San Mateo de Huanchor, the Sarayaku community and of the Community of La Oroya, these rights were noted, and the more recent FERTICA case dealt with the right to association. It will be interesting to see how the regional system deals with further developments along these lines.

Although this report focuses on decisions on the merits, it also highlights two cases that were submitted to "friendly settlements"⁴¹ and four cases which dealt only with admissibility because they discuss issues highly relevant to the topic of business and human rights in the region. One of the cases dealing with admissibility clearly relates to state responsibility for the activities of a mining company, while another refers to freedom of association.⁴² The latter case is important because it differs from the majority of cases concerning business activities which relate to indigenous peoples rights. When the Commission receives a petition, it determines whether the petition fulfils all the requirements set forth in article 46 and 47 of the Convention. Once the petition is deemed admissible, the merits decision determines the state's responsibility for a human rights violation. In its reports on the merits, the Commission includes its conclusions and recommendations for the state.

References to individual cases are in chronological order. Readers should note that this section shows only the most relevant decisions adopted by the Commission regarding

⁴⁰ Article 21 of the American Convention on Human Rights refers to the right to property and the Court has interpreted that this right has two different dimensions: the individual dimension which refers to private property and the collective dimension which includes the right to land. Article 21 states that "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law."

⁴¹ American Convention on Human Rights Article 49 "If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it."

⁴² Article 2 of the 154 Collective Bargaining Convention, 1981, defines collective bargaining as follows: "the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other."

the state duty to protect related to business activities. Appendix 1 provides a summary table regarding these individual cases.

a) Yanomani indigenous peoples v Brazil, Merits, (1985)

The key issue in this case is the impact of the trans-Amazonian highway construction BR 210 (Rodovia Perimetral Norte) on the Yanomani indigenous peoples, particularly on their rights to land⁴³ and cultural identity. Though the project was state run, it introduced the arrival of miners and other actors interested in the exploitation of natural resources in the area. The Commission ruled that the alleged violations had their origin “in the failure to establish the Yanomami Park for the protection of the cultural heritage of this Indian group; in the authorization to exploit the resources of the subsoil of the Indian territories.”⁴⁴

In its Resolution 76/85, the Commission highlighted the rights of indigenous peoples to be consulted in all matters of their interest. The Commission emphasized the importance of assuring indigenous peoples the right to express themselves in their own language.⁴⁵ This requirement has a significant relevance for the elaboration of the concept of social license to operate based on a human rights approach as it is outlined in section V of this report.

b) Mayagna (Sumo) Awas Tingni v Nicaragua, Merits (1998)

The petitioners alleged violation to their right to land because the state granted a 30-year concession to the company *Sol del Caribe, S.A.* (SOLCARSA) to exploit approximately 62,000 hectares of tropical forest in the Atlantic coast region on land claimed by the Community.

In its Report N° 27/98 approved on March 3, 1998, the Commission concluded:

“142. The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.”

In addition, the Commission recommended the state to:

“b. suspend as soon as possible, all activity related to the logging concession within the Awas Tingni communal lands granted to SOLCARSA by the State, until the matter of the ownership of the land, which affects the indigenous

⁴³ At the time this case was filed with the Commission, Brazil was not a State party to the American Convention. Therefore, petitioners alleged the violation of the right to property enshrined in article XXIII of the American Declaration that provides: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”

⁴⁴ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Case 7615 v Brazil, Resolution 12/85, March, 5, 1985, paragraph 2.

⁴⁵ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Case 7615 v Brazil, Resolution 12/85, March, 5, 1985, paragraph 7.

communities, [has been] resolved, or a specific agreement [has been] reached between the State and the Awás Tingni Community.⁴⁶

This statement clearly recognizes the duty of the state to prevent abuses by companies.

c) Community U'wa v Colombia, Friendly Settlement (1999)

In its Third Report on the Human Rights Situation in Colombia 1999⁴⁷, the Commission reported that it was reviewing a petition filed by the Community U'wa alleging the violation of its right to land by international oil companies in cooperation with the Colombian Oil Company (ECOPETROL). The Community U'wa claimed it was not consulted when the state authorized the enterprises to operate in its indigenous territory. While the Commission stated that both parties had declared their interests in starting a friendly settlement, a settlement was never reached and petition is still under consideration.

d) Case of Mary and Carrie Dann v The United States of America, Merits, (2002)

Mary and Carrie Dann are members of the Western Shoshone indigenous peoples in the State of Nevada in the United States. They alleged the state party violated their right to land because their land was not demarcated. Furthermore, they argued their lands were given to the Gold Nevada Mining Company without their consent.

In this case, the Commission did not tackle in depth the issue of business and human rights. However, it did recommend that the state should adopt special measures to ensure recognition of: 1) indigenous peoples' interests in land and traditional resources, and 2) their right to be informed and offer their opinions in all matters concerning their interests.⁴⁸ This recommendation implies that all decisions relating to corporate interests should not be made without gaining the consent of indigenous peoples.

e) Case of Mercedes Julia Huenteao Beroiza et al. v Chile, Friendly settlement (2004)

The petitioners are members of the Mapuche Pehuenche people of the Upper Bío Bío Sector in the Eighth Region of Chile. The petitioners claimed their rights to life (article 4), personal integrity (article 5), judicial guarantees (article 8), freedom of religion (article 12), protection of the family (article 17), property (article 21) and right to judicial protection (article 25) were violated by the implementation of the Ralco Hydroelectric Plant Project by the state owned company *Empresa Nacional de Electricidad S.A.* (ENDESA). On October 5, 1993, the ENDESA Company received approval for a

⁴⁶ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS Report 27/98 adopted on March 3, 1998, see INTER-AMERICAN COURT ON HUMAN RIGHTS, Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua, Preliminary objections, judgment of February 1, 2000, Series C number 66.

⁴⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS Third Report on the Human Rights Situation in Colombia 1999, chapter X, paragraph 32. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999 Original: English <http://www.cidh.org/countryrep/Colom99en/chapter-10.htm>

⁴⁸ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Case 11.140 of Mary and Carrie Dann v The United States of America, Report 75/02, December 27, 2002, OEA/Ser.L/V/II.116, Doc 46, paragraph 131.

project to build a hydroelectric plant in Ralco, the area where the petitioners live. Despite the opposition of the community, construction of the dam commenced in 1993.

On February 26, 2003, representatives of Chile and the Mapuche expressed their intention to seek a friendly settlement and agreed to implement mechanisms to ensure the participation of the community within the administration of the Nation Forest RALCO. They also agreed on mechanisms ensuring that indigenous communities are informed, heard from, and that their concerns are considered in any follow-up and monitoring of the environmental obligations of the Ralco Hydroelectric Project.⁴⁹

f) Case of the Mayas Indigenous Community v Belize, Merits, (2004)

The petitioners, members of an indigenous community, alleged a violation of their right to land, resulting from concessions authorized by the State of Belize to oil and logging companies. The petitioners claimed that since 1993, Belize's Ministry of Natural Resources has granted numerous concessions for logging on a total of over half a million acres of land in the Toledo District, including sizeable concessions granted to two Malaysian timber companies, Toledo Atlantic International, Ltd. and Atlantic Industries, Ltd.⁵⁰ In this case, the Commission for the first time included a specific section named "Logging and Oil Concessions and their Impact on the Natural Environment".

Based on proven facts, the Commission concluded that "the right to use and enjoy property may be impeded when the State itself, or *third parties* acting with the acquiescence or tolerance of the State, affect the existence, value, use or enjoyment of that property without due consideration of and informed consultations with those having rights in the property."⁵¹ (Emphasis added) Here, the Commission clearly indicated that a state must not acquiesce in the protection of rights from company activities.

g) Case of Community San Mateo de Huanchor and its members v Peru, Admissibility (2004)⁵²

On February 28, 2003, the Commission received a petition from the National Coordinator of Communities of Peru Affected by Mining against the state of Peru. The petitioners claimed Peru was responsible for violating their individual and collective rights as a result of the environmental pollution produced by a field of toxic waste sludge next to the community. The petitioners argued that "the Lizandro Proaño S.A. mining company, by means of Supreme Decree No. 016-97-EM of the Ministry of Energy and Mines, acquired from CENTROMIN-Peru the farm of Mayoc located in the basin of the Rímac River, 50 meters away from the districts of Daza and Mayo of San de Mateo de Huanchor. The petitioners claimed that the mining concession infringed legal provisions for the mining sector, especially Law 27015 on mining concessions in urban areas and urban expansion, because it was granted in a zone of urban expansion, did not observe the provisions requiring submission of an environmental impact assessment (EIA) study

⁴⁹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Case 4617/02 of Mercedes Julia Huenteao Beroiza et al v Chile, Report N°30/04, March 11, 2004, page 6.

⁵⁰ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report 40/04, case 12.053, merits, Maya Indigenous Community v. Belize, October 12, 2004, paragraph 28.

⁵¹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report 40/04, case 12.053, merits, Maya Indigenous Community v. Belize, October 12, 2004, paragraph 140.

⁵² INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Community San Mateo de Huanchor and its members v Peru Report 69/04, case 504/03, admissibility, October 15, 2004.

on the effects of the mining, and was not authorized by the respective municipal permit from the office of the mayor.⁵³”

This is a challenging case because it explicitly raises the issue of where responsibility lies under the Convention for corporate abuses of human rights. For instance, the State argued that:

“the responsibility for transferring the mining sludge pertained to the mining company holder of the respective mining concession, that is, Wiese Sudameris Leasing S.A., which had undertaken some actions to remove the sludge. Nevertheless, these actions had not been approved by the Ministry of Energy and Mines because they did not comply with the suitable technical environmental standards required by environmental regulations. The State added that the Ministry of Energy and Mines, in view of the negligence of the concession-holding mining company and the severe risk to the health of the population of San Mateo Huanchor, had hired a consultant to conduct technical environmental studies needed to remove the sludge from Mayoc. The State also reported that a Technical Commission was established to offer a better alternative for the final disposal of the Mayoc sludge.⁵⁴”

Thus, the state suggested that it had acted with the required level of due diligence to prevent abuse by the company and therefore should not be held responsible for any damage caused by the company.

The petitioners argued that the state allowed the problem of environmental pollution caused by the sludge field and arsenic, lead, and mercury poisoning of the members of the Community of San Mateo de Huanchor to continue. They also said that problems continued to occur despite the fact that in 2001 the Ministry of Energy and Mines ordered the definitive shutdown of the Mayoc mining sludge dump and its relocation and also fined the company with 210 tax units.

The Commission declared the petition admissible with respect to articles 4 (right to life), 5 (right to personal integrity), 8 (right to judicial guarantees), 17 (protection of the family), 19 (rights of the child), 21 (right to property), 25 (right to judicial protection), and 26 (economical, social and cultural rights – progressive development) 1(1) and 2 of the Convention. This petition is still under consideration by the Commission. The report on the merits has not been released.

This case highlights how business activities may affect a wide spectrum of rights, including the rights of the child and economical and social rights, as alleged in this case.

h) Case of the Kichwa peoples of the Sarayaku Community and others v Ecuador, Admissibility (2004)⁵⁵

⁵³ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Community San Mateo de Huanchor and its members v Peru Report 69/04, case 504/03, admissibility, October 15, 2004, paragraph 17.

⁵⁴ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Community San Mateo de Huanchor and its members v Peru Report 69/04, case 504/03, admissibility, October 15, 2004, paragraph 13.

⁵⁵ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Case of the Kichwa peoples of the Sarayaku Community and others v Ecuador, Petition 167/03, Report N° 64/04, October 13, 2004.

The petitioners argued that the state was responsible for allowing third parties to systematically violate their rights to land, personal integrity and judicial guarantees. The petitioners claimed their rights were violated as a result of the activities carried out by the Argentine oil company *Compañía General de Combustible* on the ancestral lands of the Sarayaku community without its consent. The petitioners also claimed that they suffered a series of threats, assaults, illegal detentions and abuses perpetrated by oil company employees and guards.

The Commission stated that the:

“(...) irregularities in the consultation process conducted by the State with respect to the oil exploration and exploitation concession granted to a company to be carried out in the ancestral territory of the Kichwa indigenous people of Sarayaku, as well as the threats, attacks, persecution, and harassment directed against members and leaders of that nationality and its respective traditional organization, and the threats and harassment suffered by the girls of the community, and the restrictions placed on movement using the Community’s access routes, if proved, could constitute violations of the rights guaranteed in Articles 4 (life), 5 (personal integrity), 7 (personal liberty and security), 8 (due process), 12 (freedom of religion and conscience), 13 (freedom of thought and expression), 16 (association), 19 (rights of the child), 21 (property), 22 (freedom of movement), 23 (political participation), 24 (equality before the law), 25 (judicial protection), and 26 (progressive development), all of the American Convention, in relation to Articles 1(1) and 2 of the same instrument.⁵⁶”

The Commission declared the petition admissible, though it is still considering the merits of the case. This case alleges physical assault and illegal detention by private individuals hired by the company. Therefore, it raises a new issue in the regional system on how to deal with state acquiescence where a company is responsible for violence rather than paramilitary groups.

i) Case of Workers belonging to the Association of “Fertilizer Workers” (FERTICA) Union v Costa Rica, Admissibility (2006)⁵⁷

The petitioners alleged that the company known as “Fertilizers of Central America” [*Fertilizantes de Centroamérica*] dismissed them from employment and engaged in a series of abusive acts against the Association of Fertilizer Workers. These acts were the subject of complaints lodged with administrative and judicial authorities, but they never received an effective response by the state and no judgment was ever issued in response to the petitions filed within the national jurisdiction since 1996. The company was a state owned company at the time that the petitioners filed their claim to the Commission.

This case was held admissible with respect to the right to judicial guarantees, right to judicial protection and freedom of association. It is currently under consideration by the

⁵⁶ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Case of the Kichwa peoples of the Sarayaku Community and others v Ecuador, Petition 167/03, Report N° 64/04, October 13, 2004, paragraph 74.

⁵⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Case of Workers belonging to the Association of “Fertilizer Workers” (FERTICA) Union v Costa Rica, Report 21/06, petition 2893/02, March 2, 2006.

Commission. This case also highlights the issue of state protection regarding the right of association and the right to collective bargaining from company abuse.

j) Case of Indigenous Community Kelyenmagategma of Enxet-Lengua peoples v Paraguay, Admissibility (2007)⁵⁸

The petitioners alleged that employees from the company known as “El Algarrobal” threatened them in order to influence them to move away from their land and to give up their complaints for the recognition of their property rights. This case was held admissible with respect to the rights to life, personal integrity, private life, protection of the family, property, judicial guarantees, right to judicial protection and rights of children. It is relevant to note that the Commission held this case admissible with respect to the right to education enshrined in article 13 of the Additional Protocol to the American Convention in relation to Economical, Social and Cultural Rights.

2. Precautionary measures

An overview of the decisions adopted by the Commission regarding precautionary measures reveals certain trends regarding the substantive issues which may cause the Commission to grant urgent measures as well as the type of measures that a state could be requested to adopt.

Certain substantive issues are more likely to prompt precautionary measures, including, those concerning the right to life and the right to personal integrity. However, the decisions regarding Nicaragua, Belize and Suriname, raised issues surrounding indigenous peoples’ rights or tribal communities’ rights and protection of the right to land. Further, other decisions involving Peru and El Salvador have granted precautionary measures to avoid negative impacts on child rights and the right to health.

Until ten years ago, measures by petitioners were nearly always restricted to the suspension or cancellation of permits, licences or concessions authorized by the state. However, since 2004, the Commission has also asked for measures that more directly require the continued involvement of the relevant corporation, perhaps recognizing that continued engagement may be important in preventing future harm. A clear example is the request to Peru to conduct environmental impact assessments. This shows that the system is moving forward to face new challenges raised by business activities.

Furthermore the analysis of the precautionary measures suggests that the Commission believes that state responsibility does not conclude with a payment of compensation. Importantly, the Commission has also highlighted that states could find projects disrupted if they do not take the right steps in the early stages of a specific business project to safeguard rights.

This section includes relevant decisions on precautionary measures regarding business activities. It does not include information regarding the follow up of the request adopted by the Commission. Indeed, it would be important to know how the Commission monitors its decisions adopted regarding individual petitions and precautionary measures. It would also be very beneficial to provide public access about the results of precautionary measures. Appendix 2 provides a summary table of precautionary

⁵⁸ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Annual Report 2007, chapter 3

measures. It is interesting to observe that many of the precautionary measures below relate to cases already mentioned above.

a) Mayagna (Sumo) Awas Tingni v Nicaragua⁵⁹

On December 3, 1995, the Commission received a supplementary request regarding precautionary measures, because the state was about to grant SOLCARSA a concession to commence logging on communal lands. On October 31, 1997, the Commission requested that the state adopt whatever precautionary measures were required to suspend the concession granted to SOLCARSA, and set a 30-day limit for Nicaragua to report on those measures.

b) Maya indigenous communities v Belize

On October 20, 2000, the Commission granted precautionary measures on behalf of the Maya Indigenous Communities and their members and requested the State of Belize to take the necessary measures to suspend all permits, licenses, and concessions allowing for the drilling of oil and any other tapping of natural resources on lands used and occupied by the Maya Communities in the District of Toledo, in order to investigate the allegations in this case. The state did not reply to the Commission's request.⁶⁰

c) Twelve Saramaka clans v Suriname

On August 8, 2002 the Commission issued precautionary measures to protect the twelve Saramaka clans who claimed that the State of Suriname had granted numerous logging, road-building and mining concessions in the Saramaka territory, without consulting the clans and that this constituted an immediate, substantial and irreparable threat to the physical and cultural integrity of the Saramaka people. The Commission requested the state take the appropriate measures to suspend all concessions, including permits and licenses for logging and mine exploration and other natural resource development activity on lands used and occupied by these clans, until the substantive claims raised by the petitioner were examined in Case 12.338, still pending before the Commission. The Commission also requested that the state take all appropriate measures to protect the physical integrity of the clan members.⁶¹

d) Community San Mateo de Huanchor v Peru

On August 17, 2004, the Commission granted precautionary measures on behalf of Oscar González Anchurayco and members of the Community of San Mateo de Huanchor. The beneficiaries of these measures, comprising more than 5,000 families, indicated that their living conditions, health, food, farming and livestock were threatened by deposits from an open-air mine in the vicinity of the Rimac River.

The Commission said that:

“the studies conducted by the Department of Environmental Health of the Ministry of Health conclude that the cumulative power and chronic effect of arsenic, lead, and cadmium in the deposits generated a high risk of exposure for the communities

⁵⁹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Annual Report 1997, chapter 3.

⁶⁰ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Annual Report 2000, chapter 3.

⁶¹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Annual Report 2002, chapter 3.

of the zone; that environmental pollution is affecting the health of the dwellers of the communities; and that children are suffering from very high levels of lead concentration in their blood.” In view of the risks to the beneficiaries, the Commission granted precautionary measures to protect the life and personal safety of Oscar González Anchurayco and the members of the Community of San Mateo de Huanchor. Likewise, the Commission requested the Peruvian State to adopt the following measures:

1. “Starting up a health assistance and care program for the population of San Mateo de Huanchor, especially its children, in order to identify those persons who might have been affected by the pollution so that they can be given relevant medical care.
2. Drawing up as quickly as possible an environmental impact assessment study required for removing the sludge containing the toxic waste, which is located in the vicinity of the town of San Mateo de Huanchor.
3. Once the environmental impact assessment study has been completed, the state should start the work required to treat and transfer the sludge to a safe site, where it will not produce pollution, in line with the technical conditions set forth in the above-mentioned study.
4. Drawing up a timetable of activities to monitor compliance with the measure adopted by the IACHR.
5. According to the effects of the implementation of this measure, the community and its representatives, as well as the information and studies that can be used as part of these procedures, shall be taken into account.”⁶²

e) Margarita Pérez Anchiraico et al. (San Mateo de Huanchor Community) v Peru

On August 11, 2006, the Commission granted precautionary measures to Margarita Pérez Anchiraico, Chair of the Committee for those Affected by Mining in Mayoc, Peru. Mrs. Pérez Anchiraico alleged that she was the target of harassment because of her activism in the San Mateo de Huanchor Community, a matter that is the also the subject of a petition awaiting final judgment by the Commission. “It is stated that on the night of July 16, 2006, Margarita Pérez was threatened with death: she was told that she would be blown up if she continued to oppose the re-opening of the mine.” Because of this information, the Commission requested that the Government of Peru adopt measures necessary to protect the life and physical integrity of certain beneficiaries and report on action taken to investigate judicially the events that gave rise to the precautionary measures.⁶³

⁶² INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Community San Mateo de Huanchor and its members v Peru Report 69/04, case 504/03, admissibility, October 15, 2004, paragraph 12. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Annual Report 2004, chapter 3.

⁶³ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Annual Report 2006, chapter 3

f) Marco Arana, Mirtha Vásquez and others v Peru

On April 23, 2007, the Commission granted precautionary measures to protect priest Marco Arana, attorney Mirtha Vásquez and other members of the non governmental organization “Group of Integral Education for Sustainable Development” (GRUFIDES: Grupo de Formación Integral para el Desarrollo Sostenible) against alleged intimidation and threats by individuals who support Newmont mining activities in the region. GRUFIDES is an organization that does advocacy for the defense of the environment and provides legal assistance for peasant communities around the city of Cajamarca in northern Peru. The Commission requested the state to adopt necessary measures to guarantee the life and personal integrity of the beneficiaries, verify the effective implementation of the measures of protection by the competent authorities and provide perimeter surveillance for the headquarters of the NGO GRUFIDES.

g) Community of La Oroya v Peru

On August 31, 2007, the Commission granted precautionary measures on behalf of 65 residents of the city of La Oroya in Peru. The petitioners alleged that they suffer from a series of health problems stemming from high levels of air, soil, and water pollution in the community of La Oroya, as a result of metallic particles released by The Doe Run company.

h) Site “El Niño” v El Salvador

On January 2, 2008, the Commission granted precautionary measures protecting 38 children whose health and lives are said to be threatened as a result of contamination due to extremely high lead levels. The beneficiaries have asked for the definitive shutdown of a company facility that produces batteries.⁶⁴

3. Country reports

The Commission analyses and evaluates human rights situations in the OAS Member States. In accordance with article 58 of its Rules of Procedure, the Commission shall elaborate and publish the studies and reports it deems necessary to promote the defence and respect of human rights. The Commission considers reports from non-governmental organizations, for instance, when those reports are filed as *amicus curiae* during the proceedings of a petition or when they are presented during a public hearing. The Commission always endeavours to assure a participatory process during the research and analysis of specific human rights situations. Thus, OAS Member States, civil society organizations and all individuals have access to the Commission through hearings⁶⁵, working meetings, and electronic mails, among other mechanisms.

a) Brazil

Report on the Situation of Human Rights in Brazil, 1997

In its country report, the Commission examined the state’s response to the Commission’s recommendations regarding the case of the Yanomani Indians previously analysed as an individual case against Brazil.

⁶⁴ This quotation is brief because it is based on news appearing in an online newspaper “La Prensa Grafica” January 11, 2008, <http://www.laprensagrafica.com/nacion/964095.asp>

⁶⁵ Rules on hearing are set up in Chapter VI of the Rules of Procedure.

In this report the Commission determined that its recommendations had been implemented, and that the demarcation and definitive titling of the Yanomami area had been completed.⁶⁶ The Commission also recommended that Brazil “institute federal protection measures with regard to Indian lands threatened by invaders, with particular attention to those of the Yanomami, and in Amazon in general, including an increase in controlling, prosecuting and imposing severe punishment on the actual perpetrators and architects of such crimes, as well as the state agents who are active or passive accomplices.”⁶⁷

Indeed, the implementation of this recommendation might relate to corporate activities because it emphasizes the state duty to protect the right to property against any violation perpetrated by the direct action of public officials, or indirectly when they tolerate violations of human rights committed by private persons.

b) Colombia

Third Report on the Human Rights Situation in Colombia, 1999

Regarding indigenous peoples’ rights in Colombia, the Commission made the following recommendations to the state:

“The State should continue to take special measures to protect the life and physical integrity of indigenous persons. These measures should include the investigation and sanction of the perpetrators of acts of violence against indigenous persons. (...) 3. The State should ensure that the exploitation of natural resources found at indigenous lands should be preceded by appropriate consultations with and, to the extent legally required, consent from the affected indigenous communities. The State should also ensure that such exploitation does not cause irreparable harm to the religious, economic or cultural identity and rights of the indigenous communities. 4. The State should ensure that major development projects in or near indigenous lands or areas of indigenous population, carried out after complying with the requirements of the law, do not cause irreparable harm to the religious, economic or cultural identity and rights of indigenous communities. 5. The State should take special measures, in connection with its actions against illicit drug trafficking and production, to ensure the physical safety of indigenous persons and to respect their other rights, land, property, culture and organization.”⁶⁸

Recommendation number four refers to basic requirements for development projects executed in or near indigenous lands. The Commission suggests a legal framework without detailing what requirements will effectively regulate these projects. However, it does suggest the need to observe the rule of non-discrimination and to include a rights-based approach in devising measures to regulate major development projects.

⁶⁶ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report on the Situation of Human Rights in Brazil, Chapter VI, OEA/Ser.L/V/II.97, Doc. 29 rev.1, 29 September 1997, Original: Portuguese, paragraph 71.

⁶⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report on the Situation of Human Rights in Brazil, Chapter VI, OEA/Ser.L/V/II.97, Doc. 29 rev.1, 29 September 1997, Original: Portuguese

⁶⁸ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Third Report on the Human Rights Situation in Colombia 1999, chapter X, letter J, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999 Original: English <http://www.cidh.org/countryrep/Colom99en/chapter-10.htm>

Finally, in its fifth recommendation, the Commission refers to “special measures” instead of “appropriate measures”. Based on the current meaning of “special measures” within Inter-American Human Rights Law, it is possible to infer that there is an additional duty upon states to protect indigenous peoples rights regarding any action adopted to fight against drug trafficking and its production. For instance, a state must guarantee that any action performed by its public officials or enterprises to eradicate plantations must not have a negative impact on health and the environment.

c) Ecuador

Report on the situation of Human Rights in Ecuador, 1997

In its report on the situation of human rights in Ecuador, the Commission analysed the impact of oil exploitation activities by a state-owned oil company on the health and lives of nearby residents.

Here, the Commission made important considerations regarding the exploitation of natural resources, concessions and international investment. It stated that international investment has a positive impact in a country, but it is necessary for states parties to establish appropriate regulations and monitoring when the environment and human rights may be impacted. Moreover, the Commission suggested that the obligation to act with due diligence includes the need to adopt preventive measures regarding the impact of private actors’ activities on human rights. Thus the Commission concluded that:

“The State of Ecuador must ensure that measures are in place to prevent and protect against the occurrence of environmental contamination which threatens the lives of the inhabitants of development sectors. Where the right to life of Oriente residents has been infringed upon by environmental contamination, the Government is obliged to respond with appropriate measures of investigation and redress.⁶⁹”

This conclusion highlights the Commission believes states should act with proper due diligence to safeguard rights in the context of development projects and international investment. However, it does not define appropriate due diligence, suggesting that states have discretion in how they choose to fulfil the duty.

The Commission made substantive references to other human rights, including the rights to access to information, to participate in decision-making, and to access to judicial remedies that this report analyzes in section III.

Finally, the Commission’s country report suggested that the Commission saw some responsibility for corporations to prevent harm, even if it considered that it was the state that had legal obligations for correcting harm under the Convention.

“As the Commission observed at the conclusion of its observation in loco: “Decontamination is needed to correct mistakes that ought never to have happened.” Both the State and the companies conducting oil exploitation activities are responsible for such anomalies, and both should be responsible for

⁶⁹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report on the Situation of Human Rights in Ecuador, Chapter IX, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, Original: Spanish/English

correcting them. It is the duty of the State to ensure that they are corrected.⁷⁰”(Emphasis added)

This is the first time that an Inter-American supervisory organ explicitly referred to responsibilities held by both companies and states.

d) Peru

Second Report on the Situation of Human Rights in Peru 2000

Regarding the protection of indigenous peoples’ rights, the Commission recommended the state adopt measures to assure the right of indigenous peoples to participate and to be consulted in all projects and programs that could impact their lives. In this regard, the Commission made the following recommendation to the state:

“5. That it ensures, consistent with ILO Convention 169, that all projects to build infrastructure or exploit natural resources in the indigenous area or that affect their *habitat* or culture are processed and decided on with the participation of and in consultation with the peoples interested, with a view to obtaining their consent and possible participation in the benefits.⁷¹”

⁷⁰ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report on the Situation of Human Rights in Ecuador, Chapter IX, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, Original: Spanish/English

⁷¹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Second Report on the Situation of Human Rights in Peru 2000 chapter X, OEA/Ser.L/V/II.106 Doc. 59 rev. June 2, 2000, Original: Spanish <http://www.cidh.org/countryrep/Peru2000en/TOC.htm>

2.2 JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights is the only judicial organ of the regional system. The Court adopts judgments, advisory opinions and provisional measures. An overview of the judgments on the merits does not show extensive and comprehensive references to states' responsibilities for business operations. The issue has also not been analysed through an advisory opinion. Nevertheless, as highlighted below, the Court has on several occasions, granted provisional measures to ensure that states protect human rights threatened by business operations.

1. Judgments

At the time this report was written, there were 174 judgments the Inter-American Court's website. Although the issue of business and human rights has not been raised in any of the judgments in depth, this report touches on relevant considerations made in four judgments on the merits. These cases implicitly deal with state responsibility for the actions of corporations, both state and privately owned.

a. Case of Baena v Panama⁷²

In this case, the Co-ordinating Organisation of State Enterprise Workers Unions petitioned the Government of Panama to, among other labour claims, halt privatisation of state enterprises. The state rejected the petition and the Union called for a 24 hour work stoppage. Then, on the basis of the Law N°25 adopted on December 14, 1990, 270 workers employed by public enterprises and institutions were allegedly arbitrarily dismissed, without appropriate access to administrative and labour proceedings to have their complaints heard.

Although the right to judicial guarantees was the key issue in this case, it also underlined state responsibility for acts committed by public officials working in public enterprises.

Here, the Court determined that judicial guarantees must be applied within public company procedures. In the judgment on the merits, the Court stated:

“130. The general directors and the boards of directors of the State enterprises are not either judges or tribunals in a strict sense; however, in the instant case the decisions adopted by them affected rights of the workers, for which reason it was indispensable for said authorities to comply with what was stipulated in Article 8 of the Convention.”

Regarding labour rights, the Court states that employees may not be dismissed without applying guarantees provided in article 8 of the Convention. This implied the Court believes the state must protect against unlawful dismissal in all type of enterprises. The Court said:

⁷² INTER-AMERICAN COURT OF HUMAN RIGHTS Case of Baena-Ricardo et al. v Panama, Merits, Reparations and Cost, judgment of February 2, 2001, Series C, Number 72

“134.(...) There is no doubt that, in applying a sanction with such serious consequences, the State should have ensured to the worker a due process with the guarantees provided for in the American Convention.”

b. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua

The key issue in this case was the violation of the right to land owned by indigenous peoples in Nicaragua. This right was violated as a result of a State concession granted to a logging company that exploited a tropical forest within the indigenous territory. The company performed operations even after the concession was revoked by the State. Petitioners indicated that the Mayagna Awas Tingni Community is an indigenous Sumo community located on the Atlantic coast of Nicaragua. On June 28, 1995, the Board of Directors of the RAAN Regional Council issued an administrative directive, in which “it acknowledged an agreement signed by the Autonomous Regional Government and the company Sol del Caribe S.A. (SOLCARSA) to initiate logging operations in the Wakambay area.” The Community protested the possibility of a concession on its lands being granted to SOLCARSA, without it previously having been consulted.

The plaintiff argued that Nicaragua had not demarcated the communal lands of the Awas Tingni Community, nor had it adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources were protected. Additionally, the state granted a concession on community lands without the assent of the Community and without ensuring effective remedies in response to the Community’s protests. The Commission requested that the Court declare that the state must establish a legal procedure to allow rapid demarcation and official recognition of the property rights of the Mayagna Community. It also argued that the state must abstain from granting or considering the granting of any concessions to exploit natural resources on the lands used and occupied by Awas Tingni until the issue of land tenure affecting the community has been resolved.

In this case, the Court recognized communal property of the Awas Tingni community and stated:

“(...) Based on the above, and taking into account the criterion of the Court with respect to applying article 29(b) of the Convention, the Court believes that, in light of article 21 of the Convention, the State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled.⁷³”

First, it is worth noting that the Court did not name the company (SOLCARSA); instead it used the term “third parties.” Second, the Court indicated that the state’s responsibility in this case resulted from its failure to establish a legal framework protecting indigenous peoples’ rights. Unfortunately, the Court did not elaborate further on the extent to which this breach was based on the state’s failure to protect these rights from interference by the so-called third parties.

⁷³ INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparation and Cost, Judgment of August 31, 2001, Series C, Number 70, paragraph 153.

c. Case of Claude Reyes et al v. Chile⁷⁴

In this case, Chile refused to provide Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero with the information they requested from the Foreign Investment Committee on Trillium (a forestry company) and the Río Condor Project (a deforestation project). The petitioners deemed these bodies prejudicial to the environment and to the sustainable development of their country. Instead, the state provided information corresponding to four of the seven sections included in the letter filed by the petitioners on May 7, 1998. The state alleged that “the Foreign Investment Committee [...] did not provide the company’s financial information because disclosing this information was against the collective interest,” which was “the country’s development,” and that it was the Investment Committee’s practice not to provide financial information on the company that could affect its competitiveness to third parties.⁷⁵

The foreign investment contract was originally signed between the state, two foreign companies, and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project. The contract caused considerable public debate due to its potential environmental impact. The petitioners alleged a breach of their right to information.

At issue was the violation of the right to access state-held information enshrined in article 13 of the Convention, regarding a foreign investment project. In addition, this request for information concerned verification that a state body - the Foreign Investment Committee – was acting appropriately and complying with its mandate.

The Court focused on the scope and content of the right to access to information and declared that the information the state failed to provide was of public interest, because it related to the foreign investment contract the state originally signed.

In this case, the Court deemed that the:

“State, through the corresponding entity, should provide the information requested by the victims, if appropriate, or adopt a justified decision in this regard. If the State considers that it was not the Foreign Investment Committee’s responsibility to obtain part of the information requested by the victims in this case, it should have provided a justified explanation of why it did not provide the information.⁷⁶”

Therefore, the Court concluded that Chile was in breach of its obligations by denying access to information regarding an investment project in that country.

This case outlines relevant issues regarding foreign investment projects such as the concept of public interest and the disclosure of a company’s information. In this case the Court considered that when the operation affects public interest, such as the exploitation

⁷⁴ INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of Claude Reyes et al. vs. Chile, merits, reparations and costs, judgment of September 19, 2006, Series C, Number 151.

⁷⁵ INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of Claude Reyes et al. vs. Chile, merits, reparations and costs, judgment of September 19, 2006, Series C, Number 151, paragraph 97.

⁷⁶ INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of Claude Reyes et al. vs. Chile, merits, reparations and costs, judgment of September 19, 2006, Series C, Number 151, paragraphs 158 and 159.

of natural resources, the information held by the state should be publicly accessible. Furthermore, if the state considered it necessary to restrict access to specific information, these restrictions had to be legislated, and be strictly necessary in accordance with principles that govern a democratic society. Thus, it appears that the Court was supporting maximum disclosure with respect to investment projects, even if disclosure includes providing information about a private company's activities, unless the state has good reasons to behave otherwise.

d. Case of the Saramaka People v Suriname⁷⁷

Between 1997 and 2004, the State issued at least four logging concessions and a number of mining concessions to Saramaka, non-Saramaka members and foreign companies within territory traditionally owned by members of the Saramaka community without guaranteeing the effective participation of the Saramakas. The state did not complete environmental and social impact assessments prior to issuing these concessions. Some of the granted concessions affected natural resources necessary for the economic and cultural survival of the Saramaka people. A considerable quantity of valuable timber was extracted from the territory of the Saramaka people without any compensation.

The Saramaka people alleged that they had the right to use and enjoy the natural resources that lie on and within their traditionally owned territory. The state disagreed, and alleged that article 41 of the Constitution of Suriname and article 2 of the 1986 Mining Decree bases ownership rights of all natural resources in the State. Therefore, the state claimed to have an inalienable right to the exploration and exploitation of those resources.

Among the issues addressed by the Court were: "(...) fifth, whether and to what extent the State may grant concessions for the exploration and extraction of natural resources found on and within alleged Saramaka territory; sixth, whether the concessions already issued by the State comply with the safeguards established under international law; (...) and finally, whether there are adequate and effective legal remedies available in Suriname to protect the members of the Saramaka people against acts that violate their alleged right to the use and enjoyment of communal property."⁷⁸

The Court declared that article 21 of the American Convention protects not only the territory itself, but also the natural resources found on and within indigenous and tribal people's territories.⁷⁹ Moreover, the Court outlined that this right could only be restricted under the following conditions:

- a) A restriction is previously established by law;
- b) The restriction is necessary;
- c) It is proportionate, and
- d) It aims at achieving a legitimate objective in a democratic society.⁸⁰

⁷⁷ INTER-AMERICAN COURT OF HUMAN RIGHTS, Preliminary objections, merits, reparations and costs, Judgment of November 27, 2007, Series C, Number 172.

⁷⁸ INTER-AMERICAN COURT OF HUMAN RIGHTS, Preliminary objections, merits, reparations and costs, Judgment of November 27, 2007, Series C, Number 172, paragraph 77.

⁷⁹ INTER-AMERICAN COURT OF HUMAN RIGHTS, Preliminary objections, merits, reparations and costs, Judgment of November 27, 2007, Series C, Number 172, paragraph 122.

⁸⁰ Case of the Indigenous Community Yakye Axa, paras. 144-145 citing (mutatis mutandi) Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 96; Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment

Therefore, the Court deemed that in issuing logging and mining concessions for the exploration and extraction of certain natural resources found within indigenous and tribal territories, the state was expected to abide by the following safeguards:

“First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter “development or investment plan”)⁸¹ within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment.⁸²”

It is clear that the Court considered that the state was required under the Convention to guarantee the respect of the community’s rights by all actors, including companies.

In relation to the logging concessions, the Court considered “that the logging concessions issued by the State in the Upper Suriname River lands have damaged the environment and the deterioration has had a negative impact on lands and natural resources traditionally used by members of the Saramaka people that are, in whole or in part, within the limits of the territory to which they have a communal property right. The State failed to carry out or supervise environmental and social impact assessments and failed to put in place adequate safeguards and mechanisms in order to ensure that these logging concessions would not cause major damage to Saramaka territory and communities. Furthermore, the State did not allow for the effective participation of the Saramakas in the decision-making process regarding these logging concessions, in conformity with their traditions and customs, nor did the members of the Saramaka people receive any benefit from the logging in their territory. All of the above constitutes a violation of the property rights of the members of the Saramaka people recognized under Article 21 of the Convention, in connection with Article 1.1 of said instrument.⁸³” (Emphasis added).

Here, the Court gives explicit guidance regarding the state’s failure to exercise proper due diligence. It notes no impact assessments were undertaken, no guarantees were adopted to assure effective participation of the community and no benefit for the community was achieved – all actions which the Court appeared to see as part of the state’s obligations in this situation. In relation to gold mining concessions, the Court stated essentially the same considerations as it did for logging.⁸⁴

of July 2, 2004. Series C No. 107, para. 127, and Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. para. 155. Cf., also, Case of the Indigenous Community Sawhoyamaya, supra note 75, para. 137.

⁸¹ By “development or investment plan” the Court means any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions.

⁸² INTER-AMERICAN COURT OF HUMAN RIGHTS, Preliminary objections, merits, reparations and costs, Judgment of November 27, 2007, Series C, Number 172, paragraph 129

⁸³ INTER-AMERICAN COURT OF HUMAN RIGHTS, Preliminary objections, merits, reparations and costs, Judgment of November 27, 2007, Series C, Number 172, paragraph 154.

⁸⁴ INTER-AMERICAN COURT OF HUMAN RIGHTS, Preliminary objections, merits, reparations and costs, Judgment of November 27, 2007, Series C, Number 172, paragraphs 156 and 158.

It is important to note the specific reference the Court makes to the duty of the state to perform and supervise social and environmental impact assessments of major mining projects, which would necessarily include the participation of companies or other actors acting on their behalf. The Court's decision goes even further than the Commission's call for Peru to conduct an environmental impact assessment in the case of *Community San Mateo de Huanchor and its members v Peru* (detailed above). Here, the Court not only calls for an environmental impact assessment, but also a social impact assessment, implying that it felt the state must be fully aware of the project's social costs on the community as well as the environmental costs. The Court did not call for a human rights impact assessment – while social impact assessments and human rights impact assessments can cover similar issues, the former still lack a complete human rights approach. Therefore, it would be helpful if the Commission and the Court could discuss their views on human rights impact assessments (or at least emphasize that social assessments should be completed with a rights-based approach). This would simultaneously assure a more comprehensive exploration by both states and companies of the human rights impacts of major projects and highlight the Inter-American System's recognition of the importance of states considering business impacts on human rights.

2. Provisional measures

This section outlines two relevant provisional measures regarding the state duty to protect and business activities. Although the Court has not yet used the term “companies” in any of its decisions, Judge Cançado Trindade, in a separate opinion, used the term “companies” stating that *erga omnes* obligations for human rights would be also applicable to them.⁸⁵

a. Matter of Mayagna (Sumo) Awas Tingni regarding Nicaragua, Provisional measures, Order of September 6, 2002

Measures requested by petitioners

Petitioners requested that the state conduct an exhaustive technical inspection of agricultural activities and logging in the territory. They asked that the conclusions of this inspection be submitted to the Inter-American Commission and to the Mayagna Awas Tingni Community. Likewise, petitioners asked for the development and implementation of appropriate measures to ensure definitive suspension of all logging in the territory belonging to the community by third parties and without prior agreement with it.

Decision of the Court

The Court ordered the state to adopt necessary measures to protect the use and enjoyment of lands belonging to the Mayagna Awas Tingni Community, and of natural resources existing on those lands, specifically those measures geared toward avoiding immediate and irreparable damage resulting from activities of third parties. In this order, the Court refers again to “third parties” instead of explicitly naming them “companies.” Nevertheless, the Court clearly recognized the state's responsibility to take steps to prevent abuse by private actors.

⁸⁵ INTER-AMERICAN COURT OF HUMAN RIGHTS, Matter of Pueblo indígena de Sarayaku regarding Ecuador, June 17, 2005, Opinion judge Cançado Trindade, paragraph 20. See Part V for a detailed discussion of the concept of *erga omnes*.

b. Matter of Indigenous peoples of Sarayaku regarding Ecuador, provisional measures, Order of June 17, 2005

Measures requested by the petitioners

Petitioners alleged that they were hit and kicked with sticks, stones and machetes by employees of the Argentinean Oil General Company, a private company (*Compañía General de Combustible* - CGC acronym in Spanish). There were also allegations regarding the use of explosive materials to intimidate the indigenous peoples of Sarayaku. The petitioners requested: adoption of necessary measures to protect the life and integrity of the Sarayaku indigenous peoples; investigation of the aggressions; and adoption of immediate measures to avoid irreparable damages as a result of the company's activities.

Decision of the Court

The Court ordered the state to adopt necessary measures to protect against abuse of the right to life and integrity of the Sarayaku indigenous peoples caused by third party actions.⁸⁶ Among the measures ordered by the Court, the state was asked to confiscate all explosive materials being used by third parties and to investigate the allegations of threats and abuses. As stated above, Judge Cançado Trindade used the term “companies” in his individual opinion in this decision.⁸⁷

3. Advisory Opinions

Under article 64 of the American Convention on Human Rights both member states and OAS main organs can request the Court for an advisory opinion regarding interpretations of the Convention, interpretations of other human rights treaties entered into by OAS member states and the compatibility of national laws with the these treaties.

Through its advisory opinions, the Court has examined key human rights issues that, at the time, had not been brought to its attention in an individual case. For instance, advisory opinions have considered issues such as the protection of migrants and the meaning of “law,” among others.⁸⁸

While there has not yet been an advisory opinion dealing specifically with business and human rights issues, it is important to note that the Court's 17th advisory opinion referred to the protection of the rights of the child against abuse by non-state actors.⁸⁹

Furthermore, in its 18th advisory opinion regarding the “Juridical condition and rights of undocumented migrants” the Court referred to third parties, again confirming that states could be held responsible for failing to prevent abuse by third parties:

“100. The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States,

⁸⁶ Order of June 17, 2005, resolution 1 b.

⁸⁷ INTER-AMERICAN COURT OF HUMAN RIGHTS, Matter of Indigenous peoples of Sarayaku regarding Ecuador., June 17, 2005, Opinion judge Cançado Trindade, paragraph 20.

⁸⁸ There are 19 Advisory opinions adopted by the Inter-American Court of Human Rights available in English <http://www.corteidh.or.cr/opiniones.cfm>

⁸⁹ INTER-AMERICAN COURT OF HUMAN RIGHTS, Juridical condition and human rights of the child, OC-17-02, August 28, 2002, Series A, Number 17, paragraphs 62, 65, 90.

whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.⁹⁰

Part III. Regulation and adjudication

This section outlines what the Commission and the Court have recommended to states in relation to regulating and adjudicating the activities of companies to protect against abuse by those companies.

Regulation is enshrined in article 2 of the Convention⁹¹ which compels states to take the necessary steps to adopt legislative and other measures that might be necessary to give effect to the Convention rights. Adjudication is enshrined in article 25 of the Convention⁹² which requires states to ensure that everyone has the right to simple and prompt recourse.

3.1 Regulation

Regulation involves legislation, monitoring, adoption of administrative measures and practices, among other measures. The Commission and the Court have provided general guidance as to the types of regulatory activities required to ensure protection of all human rights but have tended not to provide significant detail on what steps might be necessary to prevent abuse by companies. Nevertheless, set out below are some examples of the Inter-American System's approach to regulation with respect to business activities.

1. Legislation

Article 2 of the Convention establishes the duty to adopt legislative and other measures necessary to give effect to the Convention rights. In interpreting Article 2, the Court has generally supported domestic legal measures which protect against abuse in line with

⁹⁰ INTER-AMERICAN COURT OF HUMAN RIGHTS, Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18

⁹¹ American Convention on Human Rights, article 2 Domestic Legal Effects. "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."

⁹² American Convention on Human Rights, article 25 "Right to Judicial Protection. 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.

international standards. For instance, the Court has determined that states parties should adapt their domestic laws to the Convention provisions and that such laws must be “effective.” States are expected to: “adopt all measures necessary so that provisions contained in the Convention have full force and effect within its domestic legal system..”⁹³ Further, legislation should not be adopted which violates the Convention’s rights and freedoms.⁹⁴

The Inter-American jurisprudence determines that in order to fulfil the duty enshrined in Article 2 of the American Convention, States must eliminate any norms and practices that in any way violate the guarantees provided under the Convention, while simultaneously promulgate norms and develop practices conducive to effective observance of those guarantees.⁹⁶

There is no reason why these statements would not apply to state protection against corporate abuse. In protecting against corporate abuse, states must generally take all of the same steps they would take to prevent against abuse by a state party.

It is interesting to observe that the Court has stated that failing to eliminate harmful *practices* could result in a violation of human rights. While the following argument has not yet been explored, it is possible that the Court might consider a state responsible for failing to ensure the eradication of harmful practices embodied in corporate Codes of Conduct, Manuals and other tools. Therefore, it appears that the state duty to act with due diligence to protect against company abuse might require the state to not only legislate against business abuse but also to look carefully at business practices to ensure that they are not perpetuating harmful acts.

Such considerations might necessitate more training of public officials on issues of business and human rights so that they recognize harmful policies. Training programs on this issue could address the judiciary, ministries of economics and international trade, among others.

2. Monitoring

Monitoring is part of regulation. The Commission has dealt with this issue particularly concerning investment projects. An example of appropriate monitoring measures outlined by the Commission was stated in the *Case of the Mayagna (Sumo) Awas Tingni v Nicaragua*⁹⁷, where it recommended technical inspections on the ground, and suspension of business activities where they threaten human rights.

⁹³ INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of Garrido and Baigorria v. Argentina, reparations and costs, judgment of June 19, 1998, Series C Number 39

⁹⁴INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of Castillo Petruzzi et al, v. Peru, Merits, Reparations and Cost, judgment of 30, 1999 Series C number 52, paragraph 205. See also Case of Suárez Rosero v Ecuador, Merits, Judgment of November 12, 1997, Series C number 35, paragraph 98.

⁹⁶ INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of Castillo Petruzzi et al, v. Peru, Merits, Reparations and Cost, judgment of 30, 1999 Series C number 52, paragraph 207. See also Case of Cesti Hurtado v. Peru, merits, judgment of September 29, 1999, Series C Number 56, paragraph 166. Case of the Last Temptation of Christ v Chile, Merits, Reparations and Cost, Judgment of February 5, 2001, Series C, Number 73, paragraph, 85.

⁹⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS Report 27/98 adopted on March 3, 1998, see INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of the Mayagna (Sumo) Awas

3. Administrative measures

More guidance in the future from the Commission and the Court on appropriate administrative measures in fulfilling the duty to protect against corporate abuse would be helpful.

One example is the Commission's report on the Situation of Human Rights in Ecuador, where it said that the state should ensure respect of the right to access to information and the right to participate in decision-making process vis-à-vis international investment and business decisions. The Commission made it clear that the state and individuals need access to information to be able to monitor company activities effectively.⁹⁸

3.2 Adjudication

Adjudication includes the provision of access to effective and appropriate remedies for human rights abuses. The Commission and the Court have clearly considered that the states duty to protect requires the state to ensure victims have access to a remedy for abuse, even if the abuse was not primarily caused by the state. These institutions have also suggested in some cases that punitive action be taken against third party perpetrators in addition to securing a remedy for victims. Below are some specific examples of how the regional system has tackled the issue of the state duty to adjudicate with respect to violations perpetrated by business.

1. Effective remedies

Within its analysis of the impact of international investment on human rights, the Commission has outlined the importance of the right to access to judicial remedies enshrined in article 25⁹⁹ of the Convention. The Commission determined that:

“The right to access judicial remedies is the fundamental guarantor of rights at the national level. Article 25 of the American Convention provides that “[e]veryone 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....” This means that individuals must have access to judicial recourse to vindicate the rights to life, physical integrity and to live in a safe environment, all of which are expressly protected in the

Tingni Community v. Nicaragua, Preliminary objections, judgment of February 1, 2000, Series C number 66.

⁹⁸ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report on the Situation of Human Rights in Ecuador, Chapter IX, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, Original: Spanish/English

⁹⁹ American Convention on Human Right, Article 25. Right to Judicial Protection “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.”

Constitution. Individuals and NGO's have indicated to the Commission that, for various reasons, judicial remedies have not proven an available or effective means for individuals threatened by environmental pollution to obtain redress.”¹⁰⁰

The paragraph above clearly suggests that there should be access to redress for the effects of environmental pollution, whether or not it is primarily caused by the state or a third party.

Moreover, the Commission points out that the duty to guarantee access to effective remedies must include special focus on the needs of vulnerable groups within the society. For instance, regarding indigenous peoples, the Commission recommended to the State of Ecuador that:

“Given that the American Convention requires that all individuals of the Oriente have access to effective judicial recourse to lodge claims alleging the violation of their rights under the Constitution and the American Convention, including claims concerning the right to life and to live in an environment free from contamination, the Commission recommends that the State take measures to ensure that access to justice is more fully afforded to the people of the interior.”¹⁰¹

With regard to effective remedies, the Court has determined in countless cases that “everyone has the right to a simple and prompt recourse, or any other effective recourse, to a competent court or judge for protection against acts that violate his fundamental rights, which constitutes one of the basic pillars not only of the American Convention, but also of the very rule of law in a democratic society in the sense of the Convention.”¹⁰² The Court has also outlined that “an effective remedy requires the due application of the said recourse by its judicial authorities.”¹⁰³ This consideration constitutes a challenge for many states due to the lack of material and human resources within the Judicial Branch. Regardless, the Court clearly expects states to sufficiently train and equip their judiciaries and other relevant agencies so that complainants can obtain a fair hearing and remedies can be effectively implemented.

¹⁰⁰ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report on the Situation of Human Rights in Ecuador, Chapter IX, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, Original: Spanish/English

¹⁰¹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report on the Situation of Human Rights in Ecuador, Chapter IX, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, Original: Spanish/English

¹⁰² INTER-AMERICAN COURT OF HUMAN RIGHTS Case of the “Street Children” v. Guatemala, Merits, judgment of November 19, 1999, Series C, Number 63, paragraph 234. See also Cesti Hurtado case. Judgment of September 29, 1999. Series C No. 56, paragraph 121; Castillo Petruzzi et al. case v Peru, paragraph. 184; Paniagua Morales et al. case v Guatemala, paragraph 164; Blake case, paragraph 102; Suárez Rosero case v Ecuador, paragraph 65 and Castillo Páez case v Peru, paragraph 82.

¹⁰³ INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of the “Street Children” v. Guatemala, Merits, judgment of November 19, 1999, Series C, Number 63, paragraph 237.

2. Complaints mechanisms and redress

Article 63 of the Convention recognizes the right to have access to redress and reparations.¹⁰⁴ The Court defines that “reparations is a generic term that covers the various ways a state may make amends for the international responsibility it has incurred (*restitution in integrum*, payment of compensation, satisfaction, guarantees of non-repetitions among others).¹⁰⁵”

As regards to whether the state has a duty to ensure complaint mechanisms for business abuse it is appropriate to mention that in the country report on Ecuador, the Commission considered that complaint mechanisms regarding business operations and international investments should be based on the principle of transparency and require a proper system to disseminate information and to guarantee access to information.¹⁰⁶ Although there are not many references to the duty of redress, in its report regarding the case of the *Mayas indigenous peoples v Belize* the Commission recommended:

“6. Based on these conclusions, the Commission recommended the State to grant the Maya indigenous peoples an effective reparation, that includes the recognition of their right to collective property that they have occupied and used traditionally (...), the Commission also recommended the State to abstain from all acts that could encourage public agents or third parties that could act with its acquiescence or tolerance, that affects the existence, value, use and enjoyment of the property of the Maya indigenous peoples until their land is demarcated and titled properly.¹⁰⁷” (non official translation)

Here, the Commission emphasizes it is not enough to ensure reparation – but that the reparation must be effective, which means that it must produce a concrete positive result for the victims. This assertion may have particular importance in the business and human rights field – arguably the state must consider whether the remedy it is providing or facilitating will lead to positive results for the victims or if there is another type of remedy which might lead to a better result. For instance, where a foreign company is involved in the abuse, the state might consider approaching the company’s home state for a remedy.

The Court has not addressed in detail the issue of what reparations states should facilitate when they are held responsible for third party actions. In the *Mayagna Case*, the Court ordered that the state “abstain from acts which might lead the agents of the State itself,

¹⁰⁴ Article 63 of the American Convention on Human Rights states “1. 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. 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.”

¹⁰⁵ INTER-AMERICAN COURT OF HUMAN RIGHTS Case of Loayza Tamayo v. Peru, reparations and cost, judgment of November 27, 1998, Series C Number 42, paragraph 85.

¹⁰⁶ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report on the Situation of Human Rights in Ecuador, Chapter IX, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, Original: Spanish/English

¹⁰⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Case 12.053, of the Maya indigenous peoples v Belize, Report 40/04, October 12, 2004, paragraph 6.

or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Awas Tingni Community live and carry out their activities,¹⁰⁸ but did not specifically call for any monetary or other compensation. Nevertheless the Court has ordered different activities in order to benefit communities, like access to health services in their areas, among others.

Part IV. Regulating with extraterritorial effect

It is important to note that states parties' obligations under the Convention apply to individuals within their jurisdiction rather than only those individuals within their territory. For instance in the Case of Caballero-Delgado and Santana v. Colombia, the Court declared that:

“55. In accordance with Article 1(1) of the Convention, the States Parties are obligated to respect the rights and freedoms recognized in the Convention and to ensure their free and full exercise to all persons subject to their jurisdiction.”¹⁰⁹

This means that a state could be held responsible for failing to protect against abuse suffered by individuals within the state's jurisdiction but outside of its national territory. The Inter-American Commission has dealt with the issue of extraterritorial application of human rights obligations regarding the request for precautionary measures on behalf of the detainees being held by the United States at Guantanamo Bay, Cuba. The analysis focused on the state's action in putting the detainees offshore outside the territorial jurisdiction of the United States. The Commission granted precautionary measures noting that the determination of a state's liability does not depend on an individual's nationality or their presence within a particular geographic area, but rather whether that person can be seen as within the state's jurisdiction.¹¹⁰

Neither the Commission nor the Court has explicitly addressed a situation where a corporation acts on the state's behalf (exercising elements of governmental authority or acting under the instructions, direction or control of the state) outside the national territory, and exercises a degree of control over individuals such that, were such control to be exercised by state agents, the state's Convention obligations would likely apply in full as the individuals would be considered to be within the state's jurisdiction. Thus more guidance from the Inter-American system would be helpful regarding such a situation.

In relation to individuals outside of a state's jurisdiction, it is unclear whether states have any obligations to prevent abuse where it is committed by corporations within their jurisdiction. For instance, to date the Inter-American System has not referred to the use of extraterritorial regulation to prevent abuse by corporations. More guidance on this issue would be extremely helpful.

¹⁰⁸ INTER-AMERICAN COURT OF HUMAN RIGHTS Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Cost, Judgment of August 21, 2001, Series C, Number 79 paragraph 167.

¹⁰⁹ Merits, judgment of December, 8 1995 Series C Number 22

¹¹⁰ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Annual Report 2002, Chapter III, precautionary measures on behalf of the detainees being held by the United States at Guantanamo Bay, Cuba, OEA/Ser.L/V/II.117, Doc. 1 rev. 1, March 7, 2003, paragraph 80.

Part V. Trends and issues which would benefit from further elaboration

As set forth in the Declaration of Principles of the Summit of the Americas: "Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly." Based on the American Convention on Human Rights it is valid to state that social progress and economic prosperity can only be sustained if human rights are respected and ensured for all persons.

As this report shows, the regional system has developed some interesting considerations with regards to business and human rights. The regional system has recognized the link between human rights violations, business activities of public and private enterprises and state action and inaction. The majority of business activities under analysis relate to mining, oil, construction and logging companies.

In most of the cases, the issue of business and human rights in the Inter-American Human Rights System has been raised in relation to violations of the rights of indigenous peoples and protection of the right to life and personal integrity.

Set out below are several areas where greater elaboration by the Commission and the Court could assist all stakeholders in better understanding the state duty to protect against corporate abuse in the Inter-American system. No judgment is made as to whether and how the regional system should consider all or some of these issues – they are highlighted as much to indicate how far the system has progressed on this issue as to point out areas which could pose difficult questions for states parties, businesses, individuals and civil society.

(a) Social license to operate

Regarding the development of conceptual issues the Inter-American system provides an interesting view on the concept of social license to operate based on a human rights approach¹¹¹. Indeed, there are several decisions that deal with the issue. For instance, both the Commission and the Court have stated that it is mandatory to ensure that indigenous peoples participate in decisions which will affect their rights, particularly where the state is considering authorizing the exploration and exploitation of natural resources. In the case of the Saramaka people v Suriname, the Court highlighted that the state should ensure consultation with affected communities with the purpose to obtain their free, prior and informed consent. The Court stated:

“134. Additionally, the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions. The Court considers that the difference between “consultation” and “consent” in this context requires further analysis.¹¹²”

¹¹¹ The author has written about the issue of social license to operate. For further reference see the forthcoming article titled “A human rights approach to the concept of social license to operate” that will be published by the Andean Commission of Jurists during the first trimester of 2008.

¹¹² INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of the Saramaka people v Suriname, preliminary objections, merits, reparations and costs, judgment of November 27, 2007, Series C, N°172.

The concept of social licence to operate is a key issue with regards to business and human rights. It remains a controversial issue in the Americas, particularly in relation to exploitation of natural resources by companies. Therefore, it deserves further elaboration in the decisions and jurisprudence of the supervisory organs within the regional system, particularly on the question of whether community consultation alone is enough to protect human rights, or whether consent is also required.¹¹³

(b) *Erga Omnes obligations*

The Latin term *erga omnes* essentially translates to “in relation to everyone.” Professor Andrew Clapham explains that “the International Court of Justice asserted in the Barcelona Traction case that certain basic human rights give rise to international obligations owed by states to all other states which the Court characterized as *erga omnes* obligations (...) The *erga omnes* concept explains which human rights violations are capable of giving rise to a separate right for a state to complain about the violating state’s breaches of its obligations concerning these basic rights.”¹¹⁴ Thus one dimension of *erga omnes* is the horizontal dimension – the obligations states owe to each other.

The vertical dimension concerns the obligations states owe to those within their jurisdiction and the Inter-American system has referred to the *erga omnes* concept when discussing the state duty to protect vis-à-vis business activities. For instance, in the request for provisional measures for the Sarayaku people v Ecuador, the Court reminded the state that to effectively guarantee the human rights enshrined in the American Convention, a state party has the *erga omnes* duty to protect all persons within its jurisdiction not only in relation to state acts but also regarding third party actions.¹¹⁵

Taking ideas from both the horizontal and vertical dimensions of the *erga omnes* concept, some argue that there are also non-state responsibilities to uphold rights in the international system, even if they are not legally binding. The Inter-American Court has referred to such responsibilities on two occasions.¹¹⁶

First, regarding the Matter of the Sarayaku people, Professor Cançado Trindade raised the issue of *erga omnes* obligations regarding companies. In his statement, Professor Cançado Trindade stated that “*erga omnes* obligations address all entities and individuals, including companies and commercial societies”¹¹⁷ (translated by the author, original in Spanish). Second, the Court stated in its Advisory Opinion No. 18 that, “The effects of the fundamental principle of equality and non-discrimination encompass all States,

¹¹³ For specific references relevant for the elaboration of the concept of social license see: IACHR, Third Report on the Human Rights Situation in Colombia, 1999, chapter X, letter j. OEA/Ser.L/V/II.102.Doc 9 rev. 1, February 26, 1999. Inter-American Commission of Human Rights, Case 7615 v Brazil, Resolution 12/85, March, 5, 1985, paragraph 7.

¹¹⁴ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), 96-97

¹¹⁵ *Cfr., inter alia, Caso de la Comunidad de Paz de San José de Apartadó, supra* nota 1, considerando décimo; *Caso de las Comunidades del Jiguamiandó y del Curbaradó, supra* nota 1, considerando noveno; y *Caso Eloisa Barrios y otros. Medidas Provisionales. Resolución de la Corte Interamericana de Derechos Humanos de 23 de noviembre de 2004, considerando décimo segundo. INTER-AMERICAN COURT OF HUMAN RIGHTS, Matter of indigenous peoples of Sarayaku regarding Ecuador, provisional measures, Order of June 17, 2005, paragraph 11.*

¹¹⁶ *Ibid* at 430.

¹¹⁷ INTER-AMERICAN COURT OF HUMAN RIGHTS, Matter of Pueblo indígena de Sarayaku regarding Ecuador., June 17, 2005, Opinion judge Cançado Trindade, paragraph 20.

precisely because this principle, which belongs to the realm of *jus cogens* and is of a peremptory character, entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals.¹¹⁸

Further elaboration by the Inter-American system of the implications of the *erga omnes* concept for corporate responsibility under the Convention would clearly be beneficial. It is important to remember that the Universal Declaration of Human Rights (UDHR) refers specifically to “organs of the society” and their responsibilities to protect these rights. In addition, article 32¹¹⁹ of the American Convention enshrines a provision about the relationship between rights and duties, expressly pointing out responsibilities of each person. Taking into consideration the Universal Declaration of Human Rights and article 32 of the American Convention, it is important to know how the Inter-American system views responsibilities for corporations for their activities with respect to human rights. As outlined above, it appears that the Commission and the Court believe that only states parties to the Convention can be held legally accountable, but further elaboration would be helpful regarding corporations’ responsibilities under the Convention and the nature, scope and content of those responsibilities.

Finally, it would be useful to learn more about the Inter-American System’s views about the relevance of an obligation being deemed a *jus cogens* obligation – does it suggest any greater action by the state in order to stamp out abuse by third parties, including business? For instance the Inter-American Court has determined that the principle of non discrimination is a *jus cogens* obligation which implies *erga omnes* obligations.¹²⁰

(c) *The nature of due diligence*

It would be beneficial to have more guidance on the types of steps states must take to establish that they have acted with due diligence to prevent abuse – in other words, what might be deemed “necessary” or “appropriate” measures – and how much discretion states have in this regard.

For instance, in order to meet the due diligence “test”, do states need comprehensive public policies that comprise financial, legal, technical, administrative and judicial measures? In this regard, decisions such as the *Saramaka* case are helpful, as they indicate some of the activities a state might need to carry out to satisfy the due diligence standard, such as social impact assessments.

¹¹⁸ INTER-AMERICAN COURT OF HUMAN RIGHTS, Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 110.

¹¹⁹ American Convention on Human Rights Article 32. Relationship between Duties and Rights 1. Every person has responsibilities to his family, his community, and mankind. 2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

¹²⁰ INTER-AMERICAN COURT OF HUMAN RIGHTS, Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 100.

(d) *Regulating with extraterritorial effects*

Further guidance would be helpful regarding the extraterritorial dimensions of the duty to protect, including whether this duty requires states to take steps to prevent companies based within their jurisdiction from abusing rights abroad. Such guidance would provide more certainty to “home states” regarding their obligations, as well as to corporations on what might constitute appropriate regulation by states and to victims on their remedial options.

(e) *The evolutionary interpretation of human rights instruments.*

This is a fundamental principle of Human Rights Law that has been addressed by international supervisory human rights organs, especially by the European Court of Human Rights and the Inter-American Court of Human Rights,¹²¹ to assure adequate protection based on real social circumstances. Both tribunals have suggested that given that human rights treaties are living instruments, the interpretation of those treaties must evolve over time in view of changing circumstances.

It would thus be encouraging to see further interpretations by the regional system taking into account increased international attention on the impacts corporate activities may have on human rights. Good examples of such interpretations are the decisions mentioned in this report requesting environmental and social impact assessments.

In particular, it would be helpful to know whether the regional system considers the concept of “sphere of influence” helpful in deciding either state or corporate responsibilities with respect to business activities. The concept appears in the explanation for the first human rights principle in the United Nation’s Global Compact – which says that the business community “has a responsibility to uphold human rights both in the workplace and more broadly within its sphere of influence.”¹²²

(f) *Corpus juris*

Somewhat related, the author encourages the Inter-American institutions to consider the entire human rights *corpus juris* when deciding the parameters of the state duty to protect against corporate abuse.¹²³ The Inter-American system has already referred to the concept of *corpus juris* in relation to the rights of the child and indigenous peoples. For instance, on the rights of the child, the Inter-American Court stated that “the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child.”¹²⁴ This statement embodies the idea that both instruments may be relevant when considering how to approach any situation affecting child rights regardless of where, when and how the instruments were adopted. Regarding indigenous peoples’ rights the Court has applied the concept of *corpus juris* and determined that “ILO Convention No. 169 contains

¹²¹ For further reference about how the Inter-American Court has applied this principle see Case of the Street Children (Villagran Morales et al) v. Guatemala, paragraph 193.

¹²² <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>

¹²³ The concept of *corpus juris* comprises binding and not binding core norms – in other words the entire body of relevant international instruments on a particular topic, whether soft or hard law. For further reference see INTER-AMERICAN COURT OF HUMAN RIGHTS Advisory opinion OC-16/99 “The right to information on consular assistance in the framework of the guarantees of due process of law” October 1, 1999, Series A Number 16, paragraph 115.

¹²⁴ INTER-AMERICAN COURT OF HUMAN RIGHTS Case of Villagrán Morales et al (Street children) v Guatemala, Merits, Reparations and Cost, Judgment of 19, 1999, Series C Number 63, paragraph 194.

numerous provisions pertaining to the right of indigenous communities to communal property”¹²⁵, which is enshrined in article 21 of the American Convention.

The impact, positive or negative, that business activities have on the protection and the defence of human rights is a new trend in International Human Rights Law, and there are a number of soft law instruments in particular offering guidance in this area. Taking into account the concept of *corpus juris* quoted above, it is conceivable that international human rights supervisory organs, including the regional system, could draw from non binding principles or instruments that have been adopted during previous decades within the business sector or for the business world in order to adopt their decisions. These instruments might include the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises, the Equator Principles and the United Nations Global Compact.

(g). Economical, social and cultural rights and business operations

Protection of economical, social and cultural rights regarding business operations should be addressed in depth by the Inter-American system. Despite the countless references to environmental issues and the impact of environmental harm on the right to health among others, it would be a step forward for the supervisory organs to highlight specifically how state regulation and/or adjudication of corporate activities could help to prevent abuse of economic, social and cultural rights. For instance, it would be helpful to know what due diligence steps might be required to prevent abuse of labor rights, the right to health or the right to food, such as where a company’s food products have been alleged to negatively impact the health of persons within the state’s jurisdiction.

(h). Need for the use of the term “companies”

It would be an important step for the Inter-American system to use the term “companies” or other similar terms when discussing cases involving business abuse, instead of using the term “third parties” or “non-state actors”. This would highlight that the regional system considers it important for states to protect against business abuse and would also make it easier for jurisprudence to develop on this issue.

(i). Reparations in cases where companies are involved

The issue of reparations is one of the most well developed in the regional system but it would still be useful to see further discussion of the measures states need to adopt when businesses abuse rights. For instance, it would be interesting to have guidance about measures for satisfaction or *restitution in integrum*¹²⁶ when companies are involved, including whether reparation includes addressing systemic issues such as lack of resources for monitoring corporate impacts or for awareness-raising amongst corporations of the need to respect rights.

¹²⁵ INTER-AMERICAN COURT OF HUMAN RIGHTS Case of the Yakye Axa indigenous community v Paraguay, Merits, reparations and costs, judgment of June 17, 2005, Series C, Number 125, paragraph 130. See also paragraphs 128 and 129.

¹²⁶ *Restitutio in integrum* is a Latin concept that compels all responsible for a violation to restore the situation to its original condition, which means before the violation happened.

Part VI. Procedural recommendations

This section presents procedural recommendations that could facilitate a more in-depth focus on the issue of business and human rights within the Organization of American States, especially within the Commission and the Court.

1. The Commission should consider including more analysis of the impact of business operations on human rights and the state's role in that impact in country reports. To this end, both the reporting state and civil society should endeavour to provide the Commission with information about the situation regarding business and human rights in the reporting state.

2. There should be more interaction between corporations, as organs of society, and the regional system so that the system gains a better understanding of the challenges facing corporations in relation to respecting human rights. For instance, companies themselves could raise human rights issues in public hearings scheduled by the Inter-American Commission. At the same time, the Commission could invite business representatives to participate in its promotional activities.

3. The Commission, states parties or other relevant OAS organs should consider requesting the Court to provide an advisory opinion that interprets the state duty to protect in relation to business activities. One option is for the business community to ask the Commission to request an advisory opinion from the Court addressing this issue. Another possibility could be for a state party to request an advisory opinion, particularly if it has concerns about one of its laws, such as a national law on investment and its compatibility with the Convention. As stated above, only the Commission, states parties and other main OAS organs can request an advisory opinion from the Court.

4. Regarding the Organization of American States as a whole, it is pertinent to acknowledge the efforts undertaken to approach the private sector. Nevertheless, while the Commission and the Court may be increasingly considering the issue of business and human rights, it is not being considered in other relevant areas of the OAS. Indeed, most OAS organs still refer to the issue of "corporate social responsibility" alone without considering how human rights fit into the equation, which could detract from the importance of a human rights based approach to work with the private sector. One option is for the issue of business and human rights to be addressed in General Assembly resolutions. A resolution on business and human rights would be an important step. Furthermore, business could show their own interest in following the Organization's activities by requesting consultative status. Or the OAS could appoint a special representative for businesses and human rights in the region similar to the SRSG's position at the United Nations level. Finally, the OAS should consider more interaction with the UN in this field. One option could be an information-sharing meeting between the main human rights organs of the region and the SRSG.

ANNEXES

Annex 1 Decisions adopted by the Inter-American Commission on Human Rights listed by sector specific information

Relevant business operation	Country	Name of the case / request	Year, decision was adopted	Type of decision
Construction	Brazil	Yanomani indigenous peoples	1985	Merits
Logging	Nicaragua	Mayagna (Sumo) Awas Tingni Community	1998	Merits
Oil exploitations	Colombia	Community U'wa	1999	Friendly settlement
Mining	The United States	Mary and Carrie Dann	2002	Merits
Electricity hydroelectric project	Chile	Mercedes Huenteao et al	2004	Friendly settlement
Oil exploitations, logging	Belize	Mayas indigenous communities	2004	Merits
Mining	Peru	San Mateo de Huanchor Community	2004	Admissibility
Fertilization	Costa Rica	Workers belonging to FERTICA	2006	Admissibility

Annex 2.
Precautionary measures requested by the Inter-American Commission on Human Rights regarding States, business activities and human rights

Relevant business operation (even if it was not the key issue of the case)	Country	Name of the matter	Year	Type of measure requested by the IACHR
Logging	Nicaragua	Mayagna (Sumo) Awas Tingni Community	1995	To suspend a concession
Oil exploitations, logging	Belize	Mayas indigenous communities	2000	To suspend all permits, licenses and concessions To investigate the allegations
Mining, road construction and logging	Suriname	Saramaka people	2002	To suspend all permits, licenses and concessions To take other appropriate measures to protect the right of personal integrity of the clan members
Mining	Peru	San Mateo de Huanchor Community	2004	To provide health assistance and care program To conduct an environmental impact assessment
Mining	Peru	Margarita Pérez Anchiraico	2006	To take appropriate measures to protect the right to life and the right of personal integrity
Production of batteries	El Salvador	Site "El Niño"	2008	Not specified.

Annex 3.
Jurisprudence of the Inter-American Court of Human Rights by sector specific information

Relevant business operation (even if it was not the key issue of the case)	Country	Name of the case /matter	Year	Type of decision
Several public companies	Panama	Baena	2001	Judgment on the merits, reparations and cost
Logging	Nicaragua	Mayagna (Sumo) Awas Tingni Community	2001	Judgment on the merits, reparations and cost
Oil exploitations	Ecuador	Peoples of the Sarayaku community	2005	Provisional measures
Foreign investment project	Chile	Claude Reyes	2006	Judgment on the merits, reparations and cost
Mining, road construction and logging	Suriname	Saramaka people	2007	Judgment on the merits, reparations and cost