

REPORT N° 64/04
PETITION 167/03
ADMISSIBILITY
THE KICHWA PEOPLES OF THE SARAYAKU COMMUNITY AND ITS MEMBERS
ECUADOR
October 13, 2004

I. SUMMARY

1. On December 19, 2003, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," or the "Commission," or the "IACHR") received a petition lodged by the Association of Kichwa Peoples of Sarayaku, the Center for Justice and International Law (CEJIL), and the Center for Economic and Social Rights [*Centro de Derechos Económicos y Sociales* (CDES)] (hereinafter the "petitioners"), alleging the responsibility of the Republic of Ecuador (hereinafter the "State" or the "Ecuadorian State") to the detriment of the Kichwa indigenous people of the Sarayaku community and its members (hereinafter the "Kichwa people of Sarayaku" or "the Sarayaku community").

2. The petitioners allege that the State is responsible for a series of acts and omissions harming the Kichwa peoples of Sarayaku because it has allowed an oil company to carry out activities on the ancestral lands of the Sarayaku community without its consent, it has persecuted community leaders, and has denied judicial protection and legal due process to the Sarayaku community. In addition, the State has allowed third parties to systematically violate the rights of the Sarayaku community. In light of the foregoing, they claim that the State is responsible for violating the fundamental individual and collective rights of the Sarayaku community and its members, specifically the right to property (Article 21), judicial protection (Article 25), due process (Article 8), freedom of movement (Article 22), personal integrity (Article 5), personal liberty and security (Article 7), life (Article 4), freedom of association (Article 16), political participation (Article 23), freedom of expression (Article 13), juridical personality (Article 3), freedom of conscience and religion (Article 12), the rights of the child (Article 19), equality (Article 24), health and culture (Article 26, in accordance with Articles XI and XIII of the American Declaration of the Rights and Duties of Man) under the American Convention on Human Rights (hereinafter the "American Convention" or the "Convention"). They also allege that the State has failed to comply with its general obligations to respect and guarantee the aforementioned rights (Article 1(1)) and to adopt domestic legal provisions to make them effective (Article 2), both under the American Convention.

3. For its part, the State asserts that the petition is inadmissible due to the failure to exhaust domestic remedies, given that the petitioners filed a constitutional recourse of *amparo*, which is not the adequate or effective remedy for resolving the alleged infringement. It should have been a remedy in the administrative disputes jurisdiction.

4. The Commission concludes in this report, without prejudging the merits of the case, that the petition is admissible in accordance with Articles 46 and 47 of the Convention and that it will continue to analyze the alleged violations of Articles 4, 5, 7, 8, 12, 13, 16, 19, 21, 22, 23, 24, 25, 26 relative to Articles 1(1) and 2 of this instrument. It further decides to advise the parties of its decision and publish it in its Annual Report.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Petition

5. The petition was lodged before the Inter-American Commission on December 19, 2003, and registered as number P167/03. On February 18, 2004, the Commission forwarded copies of the pertinent portions of the complaint to the State and requested that it submit its observations within a period of 60 days in accordance with Article 30(2) of the Rules of Procedure of the

IACHR. On April 30, 2004 the Commission granted the State a one-month extension in which to present its observations.

6. On June 2, 2004, the State submitted its observations, which were forwarded to the petitioners on June 7, 2004, with a 30-day period in which to submit their considerations. On July 2, 2004, the petitioners submitted their observations, which were transmitted to the State on July 8, 2004 so that it could submit its observations within 30 days.

B. Precautionary Measures

7. On March 3, 2003, Ecuadorian Inter-institutional Commission and Franco Viteri, President of the Sarayaku Indigenous Community, requested that the Commission adopt precautionary measures to protect the rights to life, personal integrity, due process, and private property of the Sarayaku indigenous community, and, specifically, the life and personal integrity of community leaders Franco Viteri, José Gualinga Santi, and Cristina Gualinga.

8. On March 7, 2003, the Commission requested information from the Ecuadorian State regarding the application for precautionary measures. In a note received on March 13, 2003, the Inter-American Commission was informed that, as of that date, the Center for Economic and Social Rights (CDES) and the Center for Justice and International Law (CEJIL) would be the petitioners' representatives. On April 23, 2003, the State requested an extension of the deadline for submitting information. On April 24, 2003, the petitioners reiterated their application for precautionary measures, including additional information and describing the situation of imminent danger of irreparable harm experienced by the Sarayaku community and the ongoing threats against leaders Franco Viteri, José Gualinga, Francisco Santi, and Cristina Gualinga. This information was forwarded to the State on April 25, 2003, along with a deadline of 5 days in which to present its observations. The State did not respond.

9. On May 5, 2003, the IACHR requested that the Ecuadorian State adopt the following precautionary measures:

1. Adopt all measures deemed necessary to ensure the life and physical, psychological, and moral integrity of members of the Sarayaku indigenous community and particularly of Franco Viteri, José Gualinga, Francisco Santi, Cristina Gualinga, Reinaldo Alejandro Gualinga, and of the girls who might be subject to threats or intimidation by army personnel or by civilians from outside the community.

2. Investigate the incidents that occurred on January 26, 2003 in the Sarayaku Community's Tiutilhualli Paz y Vida Camp and its consequences. Prosecute and punish those responsible.

3. Adopt all necessary measures to protect the special relationship between the Sarayaku Community and its territory.

4. Agree on precautionary measures, in consultation with the community and its representatives, before the Inter-American human rights system.

10. The Commission granted the State a period of 15 days in which to inform it of the adoption of the prescribed measures.

11. On June 2, 2003, the petitioners submitted additional information that was forwarded to the State on June 5, 2003. On June 13, 2003, the State requested an extension of time in which to present its observations on the information submitted by the petitioners, and this extension was granted. On June 17, 2003, the State submitted its observations, which were transmitted to the petitioners on June 18, 2003. On June 26, 2003, the State submitted additional information to the Commission. On July 18, 2003, the petitioners submitted

additional information that was forwarded to the State on August 6, 2003. On September 24 and 30, 2003, the State submitted sets of additional information on the adoption of precautionary measures, which were forwarded to the petitioners on October 7 and 8, 2003, respectively.

12. A hearing was held on October 16, 2003 during the 118th regular period of sessions of the IACHR, which was attended by the parties. On that occasion, the petitioners requested that the precautionary measures be extended.

13. On December 17, 2003, the Commission informed the State that the precautionary measures would be extended for six months and requested that it submit information on their implementation within 15 days. On January 12, 2004, the State requested an extension of the time in which to submit the information requested, and a 15-day extension was granted.

14. On March 3, 2004, during the 119th regular period of sessions, a working meeting was held which the State failed to attend, despite having been duly notified.

C. Provisional Measures

15. On April 8, 2004, the petitioners submitted additional information and asked the Commission to request provisional measures from the Inter-American Court of Human Rights. On the same date, the Commission forwarded to the State the pertinent portions of the request, asking that the State submit information within 5 days. On April 23, 2004, the State requested a one-month extension, which was granted.

16. On April 29, 2004, the petitioners reiterated their request for provisional measures on behalf of the Sarayaku indigenous community and the adoption of precautionary measures in favor of José Serrano Salgado, legal representative of the Sarayaku community. On April 30, 2004, the Commission requested that the State extend the precautionary measures in favor of José Serrano Salgado and the members of the Center for Economic and Social Rights (CDES) and that it provide information regarding their implementation within 15 days. The State submitted its response on May 28, 2004, which was forwarded to the petitioners on June 8, 2004. The petitioners presented their observations concerning the State's response on June 9, 2004.

17. On June 15, 2004, the IACHR submitted for the consideration of the Inter-American Court an application for the adoption of provisional measures in favor of the Kichwa indigenous people of the Sarayaku community and its members, in accordance with Articles 63(2) of the Convention and 25 of the Rules of Procedure of the Court.

18. On July 6, 2004, the Inter-American Court ordered provisional measures and resolved to require the Ecuadorian State to adopt, without delay, all measures necessary to protect the life and personal integrity of the members of the Kichwa indigenous peoples of Sarayaku and those defending them in the required procedures before the authorities, to guarantee the right to freedom of movement of the members of the Sarayaku community, and to investigate the events giving rise to the adoption of provisional measures, so as to identify those responsible and impose corresponding sanctions.¹

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

¹ Inter-American Court of Human Rights, Case of the Sarayaku Indigenous Community. Provisional Measures, July 6, 2004.

19. The petitioners claim that the Ecuadorian State has violated the fundamental individual and collective rights of members of the Sarayaku indigenous community through the direct actions of State agents supporting the incursion of an oil company onto Sarayaku ancestral lands without consultation, persecuting Sarayaku leaders, and denying judicial protection and due process to the Sarayaku community. They further claim that the State is responsible, by omission, for allowing, with its consent, the systematic violation of the fundamental rights of the Sarayaku community by an oil company and its employees.

20. In light of the foregoing, the petitioners claim that the Ecuadorian state has violated, to the detriment of the Sarayaku indigenous community and its members, the following rights enshrined in the American Convention: the right to private property, judicial protection, judicial guarantees, freedom of movement, personal integrity, personal liberty, life, freedom of association, political participation, freedom of expression, recognition of juridical personality, freedom of conscience and religion, rights of the child, equality before the law, and health and culture, the latter in conjunction with Articles XI and XIII of the American Declaration of the Rights and Duties of Man. They further allege that the State has violated its general obligations to respect and ensure the aforementioned rights (Article 1(1)) and to adopt provisions of domestic law to make them effective (Article 2), both under the American Convention.

21. The petitioners indicate that the Kichwa people of Sarayaku are located in the Amazonian province of Pastaza, in the central southern portion of the Amazon region of the Republic of Ecuador and that this is one of the historic settlements of the Kichwa indigenous people,² which holds approximately 1,200 members. It is organized in the Association of the Kichwa People of Sarayaku (Tayja Saruta),³ which includes the population centers of Shiguacoca, Chontayaku, Sarayakillo, Cali Cali, Teresa Mama, Llanchama, Sarayaku Centro, and its ancestral lands, comprising 135,000 hectares, which are part of the 254,625 hectares shared with the Kichwa people of Boberas, thus occupying nearly 43% of the area of the Bobonaza River basin. The Ecuadorian State legally recognized this territory in 1992 by granting a title of territorial ownership.⁴

22. In 1996, the Ecuadorian State signed a partnership contract with the Argentine company called the Compañía General de Combustible (hereinafter the "CGC" or the "oil company"), for oil exploration and exploitation on 200,000 hectares in the Pastaza province located in an area known as "Block 23" [*Bloque 23*]. Sixty-five percent of this block consists of the legal ancestral lands of the Sarayaku indigenous community. The petitioners claim that the participation contract between the State and the oil company was entered into without respect for the regulatory, constitutional, and conventional procedures set forth in domestic and international law. Moreover, this was done without consultation of the Sarayaku indigenous community and did not fulfill the requirement of obtaining the community's free and informed consent in order to carry out extractive activities on its territory.

23. The petitioners assert that, although the exploration phase was supposed to start in 1997 according to the contract, the CGC did not launch this phase of seismic prospecting until November 2002, four years after the new Ecuadorian Political Constitution took effect, and three years after Convention 169 on Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization (hereinafter "ILO Convention 169") entered into force. The petitioners assert that, under the new Political Constitution and ILO Convention 169, it was incumbent upon the State to take all necessary measures to respect and ensure the rights of

2 The Kichwa nationality in the province of Pastaza is made up of 136 communities or centers, organized into 14 associations representing a total population of 25,000 inhabitants.

3 The political organization of the indigenous peoples of the Ecuadorian Amazon includes the following levels: The Centers, corresponding to the traditional authorities known as kurakas; the associations, which encompass different centers and represent a people; federations, which comprise various associations and which, in the case of Pastaza, is the Organization of Indigenous Peoples of Pastaza (OPIP); the confederations, which bring together federations at the regional and national levels -- they are the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE), and the Confederation of Indigenous Nationalities of Ecuador (CONAIE).

4 The indigenous peoples living in the province of Pastaza occupy 91.8% of the territory, of which the Kichwa ancestrally possess 60.02%, the Huaroni and Achuar possess 13.87% and 10.37% respectively, and the Zapara and Shiwiar possess 15.74%.

the Kichwa people of Sarayaku to their land, including the obligation to consult with them, to facilitate their participation in all decisions, and to seek their free and informed consent prior to commencing exploration activities.

24. The petitioners say that, beginning in 2002, when the oil company launched the seismic prospecting phase in Sarayaku territory, violations against the fundamental human rights of the Sarayaku people intensified to the extent that on November 25, 2002, the Governor of Pastaza province, the army headquarters of Pastaza province, the Association of Sarayaku, the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE), and the Organization of Indigenous Peoples of Pastaza (OPIP) signed an agreement in which the CGC company pledged to respect the rights of the Sarayaku community.⁵

25. On November 27, 2002, the Sarayaku people were declared to be under the protection of the Ecuadorian Ombudsman in a resolution stating that "all authorities, public officials, and natural and juridical persons shall observe, respect, attend to, and ensure the rights of the aforementioned Sarayaku community and all its members and, in particular, the right to maintain, develop, and strengthen its cultural identity and other aspects of its nationality, as well as to preserve its inalienable ownership of Sarayaku communal lands and the permanent use, usufruct, administration, and conservation of natural resources." The resolution further states that:

No person, authority or official may impede the free transit, movement, navigation, and intercommunication of Sarayaku community members throughout the lands and rivers as they require and need in the exercise of their legitimate rights. Anyone who should obstruct, oppose, impede, or limit the right to free transit and movement of members of this community shall be subject to the penalties and sanctions established under Ecuadorian law.⁶

26. Notwithstanding the Ombudsman's resolution, the petitioners claim that between November 2002 and February 2003, oil company employees and guards, with the acquiescence of members of the Armed Forces, made incursions into Sarayaku territory and destroyed woodlands, sources of food, medicines, and cultural heritage. In addition, during this period, there were a series of threats, assaults, illegal detentions, and abuses against members of the Sarayaku people which constituted systematic violations of the fundamental rights of the Sarayaku indigenous community and its members.

27. The following are some of the incidents described: On January 13, 2003, in a place known as Jatún Molino, oil company employees assaulted members of the Sarayaku community as they were traveling by canoe on the Bobonaza River, firing on them from the riverbanks; they later closed off the river passage, knocking down trees and obstructing regular passage from Sarayaku. On January 25, 2003, in the context of a military operation in Sarayaku territory, Sarayaku indigenous leaders Elvis Gualinga, Marcelo Gualinga, Reinaldo Gualinga, and Fabián Grefa were detained and tortured by members of the Ecuadorian military, police agents, and CGC contract security personnel. On January 26, 2003, members of the Ecuadorian army fired on the Paz y Vida Camp in Panduro, within Sarayaku territory, made up of approximately 60 indigenous people including women, children, elderly people and men, who were keeping watch to ensure that oil company workers did not enter their territory. On January 28, 2003, oil company laborers accompanied by members of the Ecuadorian army proceeded with seismic prospecting activities in the sector known as Rotuno Yaku (Guayacán), which the Sarayaku people consider to be a sacred site. On January 29, 2003, two minor girls were intercepted by an army patroller accompanied by oil company employees, and were threatened by the company employees, who urged the Army members to rape them. The petitioners report that before being freed, the girls were subjected to indecent assault. On December 4, 2003, approximately 120 people from the Sarayaku community, including women and children who were traveling along the Bobonaza River toward the city of Puyo to participate in a march

⁵ Document in the file.

⁶ Document in the file.

protesting the government's oil policy, were attacked and assaulted by salaried employees of the CGC company. On this occasion, the indigenous community members were beaten with sticks, struck with rocks and machetes, and their belongings were destroyed with machetes. As a result, many Sarayaku residents suffered serious injuries⁷ and four people⁸, including a boy, were detained by the attackers and freed the following day.

28. The petitioners add that on March 1, 2004, Marlon Santi, President of Sarayaku, was attacked and physically assaulted, punched, and kicked as he was preparing to travel to Washington, D.C. for a working meeting convened by the Commission. On April 23, 2004, José Serrano Salgado, attorney and legal representative of the Sarayaku community, was attacked and assaulted by three armed, hooded men who threatened him with a pistol to his head and warned him to desist from his activities on behalf of the Sarayaku indigenous community.

29. According to the petitioners, a policy of harassment and threats that has existed since 1996 against the Sarayaku community and those helping to defend their rights intensified after November 2002, because of the community's position concerning oil exploration and exploitation within the ancestral territory of the Kichwa people of Sarayaku. They say that the incursions into Sarayaku territory have caused serious harm to the life of the community. The detonations of explosives have destroyed significant areas of woodlands, water sources, caves, subterranean rivers, and sacred sites, and have caused animals to migrate to more remote areas. Explosives planted in traditional hunting areas have endangered the life of the inhabitants, and made it impossible to search for food; they have altered life cycles and deprived families of food sources. They also state that the indigenous people of Sarayaku have been harmed in their right to use and enjoy their land, and in the special relationship they have with the land. Specifically, their subsistence as a people has been jeopardized as they are prevented from obtaining basic food, traditional medicine, and healthcare, and from transmitting their cultural heritage to future generations.

30. The petitioners add that the traditional political structures of the Sarayaku community have been harmed directly through threats, persecution, and the physical, psychological and moral torture of its members and especially its leaders, for expressing their opposition to the State's oil policy.

31. With regard to the exhaustion of domestic remedies, the petitioners report that on November 28, 2002, the OPIP filed a constitutional *amparo* suit before the First Instance Judge of Civil Matters of Pastaza against the CGC⁹ in which they requested a suspension of hydrocarbonaceous activity in Block 23, basing their request on Ecuadorian constitutional law. The petitioners state that the *amparo* suit was based on the entry of oil company workers into Sarayaku territory to commence oil exploration activities without previously consulting with the authorities of the affected indigenous people. As a precautionary measure, on November 29, 2002, the judge ordered a suspension of "*any current or imminent action that affects or threatens the rights contained in the complaint.*" The precautionary measure is still in effect today and the *amparo* suit is still pending.

32. The petitioners state that the constitutional *amparo* suit filed in the domestic jurisdiction is the adequate and effective remedy in terms of the requirements of Article 46 of the American Convention.

33. With respect to the Ecuadorian State's affirmation that the administrative disputes remedy, rather than the constitutional remedy of *amparo*, was the appropriate remedy to resolve the

7 According to information sent on December 5, 2003 by representatives of the beneficiaries, the following individuals received medical attention in the Voz de Shell Hospital and Puyo Hospital: Franco Viteri; Heriberto Gualinga; Isidro Gualinga; Edgar Gualinga; Leopoldo Santi; Diosnisis Machoa; Victoria Santi; David Malaver; Soraya Cisneros; Cesar Santi; Hilda Santi; Jorge Santi; Cleotilde Gualinga; Emerson Shiguango; Flores Milo Cisneros; Marco Gualinga; Henry Gualinga; Angélica Santi; José Luis Gualinga; Aura Cuvi; Marco Santi; Laureano Gualinga; Rudy Ortiz; Héctor Santi.

8 The people who were detained were Luver Malaver, a minor, Hilda Santi (former vice president of Sarayaku), Edgar Gualinga (political lieutenant of Sarayaku), and Heriberto Gualinga.

9 The suit also named the Daymi Services company, a CGC subcontractor.

alleged infringement of a legal right, the petitioners state that the Ecuadorian State, in its argument, fails to recognize the imminence and severity of harm to human and constitutional rights to which members of the Sarayaku indigenous people were exposed due to acts and omissions by the State and the oil companies operating in their territory, in other words, the main elements that distinguish constitutional *amparo* from the administrative disputes remedy. Moreover, they added that the State fails to recognize that the Sarayaku indigenous community's main purpose in filing a constitutional *amparo* suit was not to request the annulment of the contractual concession signed by the State and the oil company, but rather to put an end to the non-consulted and unconstitutional incursion into their legal and ancestral territory which violated their rights enshrined in the Ecuadorian Constitution and in international treaties, including the American Convention.

B. Position of the State

34. In a note received by the Inter-American Commission on June 2, 2004, the State outlined its position regarding the procedural aspects of the petition seeking an exception to the failure to exhaust domestic remedies. It asserted that the Ecuadorian State has no obligations under ILO Convention 169, and requested, finally, that the petition be declared inadmissible and the case closed.

35. With respect to procedural aspects, the State challenged the exception to the failure to exhaust domestic remedies and specified the remedies that should have been exhausted and their effective exercise, based on the Inter-American Court's position in the sense that it is incumbent upon the State claiming a failure to exhaust domestic remedies to specify the remedies that should be exhausted as well as their effectiveness.

36. The State claims that the remedy used by the petitioners was not the adequate and effective remedy for resolving the alleged infringement of a legal right, because the objective of an action of *amparo* is prevention, and its purpose is to "put an end to, prevent the commission of, or immediately rectify the consequences of an illegal act" that violates a right protected by the Constitution or by international treaties, as set forth in Article 95 of the Political Constitution of Ecuador, which establishes the following in its first two paragraphs:

Anyone, in his own right or as a legitimate representative of a group, may file an *amparo* suit before the organ of the Judiciary designated by law. Through this action, which will be processed on a preferential and expedited basis, the adoption of urgent measures shall be requested to put an end to, prevent the commission of, or immediately rectify the consequences of an illegal act or omission by a public authority, which violates or could violate any right enshrined in the Constitution or in an international treaty or covenant in force and which threatens to cause imminent serious harm. The suit may also be brought if the act or omission was carried out by individuals providing a public service or acting in representation or through a concession of public authority. Judicial decisions adopted in a proceeding shall not be subject to a writ of *amparo*.

An *amparo* action also may be lodged against individuals, when their conduct seriously and directly harms a community or collective interest or a general right [*derecho difuso*]. In an *amparo* action, there will be no restriction on the judge who must hear it and it will be available every day of the week.

37. The State adds that the preventive nature of the action of *amparo* means that, once the *amparo* remedy is accepted and the constitutional violation corrected, the public authorities can once again act on the matter, as long as it does so in keeping with the constitution. Therefore, the constitutional *amparo* remedy is designed so that a first instance judge, if it is deemed necessary, may adopt urgent measures to prevent harm and not, as is the intention of this petition, to challenge an oil concession contract that, due to its legal nature, should be challenged in a different legal venue.

38. The State affirms that the oil concession is a State decision governed by the constitutional principle of public domain over natural resources of the subsoil, and that the contract legally entered into with the CGC constitutes an act doctrinally known as *an act of administrative concession* through which the State authorizes private parties to carry out certain activities that, in principle, are under its purview. The State explains that the oil concession contract is an act of administrative concession set forth in an administrative contract.

39. The State argues that should an act of this nature cause or potentially cause harm to a private individual, such as, for example, environmental harm, Ecuadorian legislation provides for another type of legal action that is adequate and effective as required by the Inter-American Court, through its administrative disputes jurisdiction, in other words, the administrative disputes subjective remedy or remedy of full jurisdiction. Articles 1 and 3 of the administrative disputes jurisdiction statute states as follows:

Article 1. The administrative disputes remedy may be lodged by natural or juridical persons against regulations, acts, or resolutions by public administration or by semi-public juridical persons acting on behalf of the State that violate a right or direct interest of the complainant.

Article 3. The administrative disputes remedy has two categories: full or subjective jurisdiction, and objective or annulment.

The full or subjective jurisdiction remedy protects a subjective right of the plaintiff that allegedly has been denied, disregarded, or totally or partially unrecognized by the administrative acts in question.

The annulment for objective reasons or for abuse of authority addresses compliance with an objective legal standard of an administrative character and may be brought by someone with a direct interest in appealing the action and asking the Court to declare the nullity of the act challenged based on legal irregularities.

40. Therefore, the State says that, by filing an *amparo* suit, it is not possible, under any circumstances, to declare the illegality of the oil concession granted to the CGC, although this could be attempted by way of a subjective or full jurisdiction remedy before the competent court.

41. The State asserts that another effective remedy within the administrative disputes process is the remedy of appeal (cassation) that the petitioner may file to challenge a judgment by district administrative disputes courts. It adds that this remedy might be adequate in the understanding of "adequate" set forth by the Inter-American Court, in other words, that the function of these remedies in the domestic law system must be suitable for addressing the infringement of a legal right.¹⁰ In cases where judges or courts have erred *in iudicando* or *in procedendo*, the State affirms that this is the adequate remedy to address the infringement of the legal right.

42. In light of the foregoing, the State believes that the existence of effective domestic remedies to resolve the petitioners' legal situation has been demonstrated, and it invokes the following position of the Inter-American Court: if a State "which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46(2)".¹¹ It is therefore incumbent upon the petitioner to demonstrate to the Commission that it has exhausted all domestic remedies.

10 Inter-American Court of Human Rights, Case of Velásquez Rodríguez. Judgment of July 29, 1988. Ser. C N° 4. Para. 64.

11 Inter-American Court of Human Rights, Case of Velásquez Rodríguez. Judgment of July 29, 1998. Ser. C N° 4. Para. 60.

43. Continuing with its observations and with respect to the petitioners' claim that the State violated the American Convention by failing to comply with its international obligations acquired through the ratification of ILO Convention 169, the Ecuadorian State asserts that it had not yet ratified Convention 169 at the time that it signed the oil concession contract with the CGC in 1996 and that, therefore, the Convention had not been incorporated into its domestic law. The State points out that international law doctrine concerning the international responsibility of States is based on the premise that every internationally illegal act committed by a State gives rise to that State's responsibility. It adds that this same doctrine includes two key elements for determining State responsibility: first, the existence of conduct constituting an act or omission attributable to a State, and second, the existence of conduct that constitutes a violation of an international obligation of that State. The State argues that in the *subjudice* petition, the international obligation emanating from Convention 169 did not exist because Ecuador ratified that Convention in 1999, after having signed the contract with CGC.

44. Regarding the constitutional *amparo* suit brought by the petitioners, the State indicates that with regard to timeliness, international jurisprudence has not established a precise *cuantum* for the length of the process; rather it establishes certain, defined criteria to consider in concrete cases. In this aspect, the Ecuadorian State maintains that since the time frames in which the State has acted to resolve the domestic suit fall within the parameters of reasonableness established by the Inter-American Court and Commission, it cannot be said to have violated Article 8(1) of the American Convention.

45. The State likewise argues that, at the domestic level, the petitioner has had access to all remedies available under Ecuadorian law for the alleged violations and that the competent court ruled on the remedy lawfully and in keeping with legal due process. In addition, the State affirms that it has respected the judicial protections that make up what is referred to as due process, and that it has always ensured a fair and impartial process.

46. In light of the foregoing, the State does not believe it is necessary to examine the merits of the petition, since it cannot be accepted by the Commission, and requests that the petition be declared inadmissible and immediately closed.

IV. ANALYSIS OF ADMISSIBILITY

A. The Commission's Competence *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

47. The petitioners are entitled, in principle, under Article 44 of the American Convention, to lodge petitions before the IACHR. The petition names as the alleged victims the Kichwa indigenous people of the Sarayaku community and its members,¹² on whose behalf the State

12 The Kichwa people of Sarayaku are an organized community, situated in a specific geographical area, whose members can be individually identified. In this regard, see paragraph 9 of the Resolution of the Inter-American Court of Human Rights of July 6, 2004 on Provisional Measures requested by the Inter-American Commission with respect to Ecuador, Case of Sarayaku Indigenous Community, which states: "That the Court has ordered the protection of a plurality of people who have not been previously named but who are identifiable and specified, and who are in a situation of grave danger because of their membership in a community. In this case, according to what the Commission has indicated, the Kichwa indigenous people of Sarayaku, comprising approximately 1,200 people, constitutes an organized community situated in a specific geographical area in the population centers of Shiguacoca, Chontayaku, Sarayakillo, Cali Cali, Teresa Mama, Llanchama, and Sarayaku Centro, in the province of Pastaza, whose members can be individually identified and who, for reasons of belonging to that community, are all facing an equal risk of suffering acts of aggression against their personal integrity and their lives. Therefore, the Court believes it is necessary to dictate provisional measures of protection on behalf of the members of the Kichwa indigenous people of Sarayaku, and which extend to all members of that community. See also the Case of the Jiguamiandó and Curbaradó Communities. Provisional Measures. Resolution of the Inter-American Court of Human Rights of March 6, 2003, ninth consideration; Case of the Paz Community of San José de Apartadó. Provisional Measures. Resolution of the Inter-American Court of Human Rights of June 18, 2002, eighth consideration; and the Case of the Paz Community of San José de Apartadó. Provisional Measures. Resolution of the Inter-American Court of Human Rights of November 24, 2000, seventh consideration. Case of the Mayagna (Sumo) Awás Tingni Community. Judgment of August 31, 2001. Ser. C No. 79, para. 149.

undertook to respect and ensure the rights recognized in the American Convention. Insofar as the State is concerned, the Commission points out that Ecuador has been a State Party to the American Convention since December 28, 1977, when it deposited its respective instrument of ratification. Therefore, the Commission has *ratione personae* competence to examine the petition.

48. The Commission has *ratione loci* competence to hear the petition as it alleges violations of rights protected by the American Convention that occurred in the territory of a State Party to that treaty. The IACHR has *ratione temporis* competence because the obligation to respect and ensure the rights protected by the American Convention already were in effect for the State on the date on which the alleged violations occurred. Finally, the Commission has *ratione materiae* competence because the petition claims violations of human rights protected by the American Convention.

49. The Commission lacks competence with respect to the petitioner's claim that the Ecuadorian State should be found to have failed to comply with ILO Convention 169. Nonetheless, it can and must use Convention 169 as a guideline for interpreting conventional obligations, in light of the provisions of Article 29 of the American Convention.

B. Requirements for Admissibility

1. Exhaustion of domestic remedies and timeliness of the petition

50. The State argues that the petition has failed to satisfy the requirement of prior exhaustion of domestic remedies under Article 46(1)(a) of the American Convention because the constitutional *amparo* suit filed by the petitioners was neither adequate nor effective for resolving the alleged infringement of a legal right and therefore it challenges the exception to the exhaustion of domestic remedies.

51. In this regard, it adds that the Inter-American Court has held that it is incumbent upon the State to indicate which domestic remedies must be exhausted and identifies as appropriate and effective remedies the subjective or full jurisdiction remedy and the remedy of appeal (cassation), both in the administrative disputes jurisdiction.

52. The State informs the Commission that Ecuadorian law in the administrative disputes jurisdiction provides, in Article 1, that the administrative dispute remedy may be lodged by natural or juridical persons against regulations, acts, and resolutions by public administration or semi-public juridical persons acting on behalf of the State and who violate a right or direct interest of the complainant.¹³ This remedy may fall either in the subjective or full jurisdiction or in the annulment or objective category. The subjective or full jurisdiction remedy protects the subjective right of the complainant that has allegedly been denied, disregarded, or totally or partially unrecognized by the administrative act in question.¹⁴

53. The remedy described by the State is intended to challenge regulations, acts and resolutions by public administration or semi-public juridical persons. The Statute of the Administrative Law System of the Executive¹⁵ defines an administrative act as any unilateral declaration made in the exercise of the administrative function that has direct individual legal effects¹⁶ and an administrative contract such as any multilateral or intentional act or declaration that produces legal effects, between two or more people, one of whom is acting in an administrative capacity.

13 Article 1 of the Administrative Disputes Jurisdiction Statute.

14 Article 3 of the Administrative Disputes Jurisdiction Statute.

15 Statute of the Administrative Legal System of the Executive, Executive Decree 1634.RO/Sup 411 of March 31, 1994.

16 Article 64 of the Statute of the Administrative Legal System of the Executive.

54. For their part, the petitioners argue that the constitutional *amparo* remedy is adequate to address the specific infringement of a legal right in this case, in other words, the violation of the fundamental rights of the indigenous people of Sarayaku. They assert that what distinguishes between the validity of the action for *amparo* and the administrative disputes remedy is not the nature of the matter per se, but rather the simultaneous presence of three elements, which are: 1) an illegal act or omission, 2) that causes or threatens grave and imminent harm to the victims, 3) in violation of a subjective right enshrined in the Constitution or in the international treaties in force.

55. The petitioners add that the intention of the constitutional *amparo* suit brought on November 28, 2002 was to request that the competent judicial authority order urgent measures to suspend hydrocarbonaceous activities in the ancestral territory of the Kichwa people of Sarayaku and to put a stop to acts committed beginning in November 2002, by people acting in representation or by concession of the public authorities who were causing serious harm to the indigenous people of the Sarayaku community and its members. The petitioners have stated that the domestic remedies attempted are based on Ecuadorian constitutional precepts and were not intended to cancel the effect of the oil concession contract signed by the Ecuadorian State and a private corporation, but rather to ensure that they respect existing domestic and international legal standards regarding the rights of indigenous peoples approved by the State itself.

56. It is necessary to clarify what domestic remedies must be exhausted in the case at hand. The Inter-American Court has stated that only those remedies adequate to correct the violations allegedly committed must be exhausted. Adequate remedies means:

... those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.¹⁷

57. The Inter-American Court has stated that the procedural institution of *amparo* has the characteristics necessary to effectively protect fundamental rights.

In the course of examining simple, rapid, and effective mechanisms involved in the provision discussed, this Court has maintained that the procedural institution of *amparo* has the required characteristics to effectively protect fundamental rights, that is, being simple and brief.¹⁸

58. The remedy of *amparo* in Ecuador is stipulated in Article 95 of its Political Constitution and the first paragraph states as follows:

Anyone, in his own right or as a representative of a group, may file an *amparo* suit before the organ of the Judiciary designated by law. Through this action, which will be processed on a preferential and expedited basis, the adoption of urgent measures shall be requested to put an end to, prevent the commission of, or immediately rectify the consequences of an illegal act or omission by a public authority, which violates or could violate any right enshrined in the Constitution or in an international treaty or covenant in force and threatens to cause imminent serious harm. The suit may also be brought if the act or omission was carried out by individuals providing a public service or acting in representation or through a concession of public authority.¹⁹

59. The Ecuadorian Constitution also states that:

17 Inter-American Court, Case of Velásquez Rodríguez. Judgment of July 29, 1988. Ser. C Nº 4, para. 64

18 Inter-American Court, Case of the Mayagna (Sumo) Awas Tingni Community vs. Nicaragua, Judgment of August 31, 2001, para. 131.

19 Article 95 of the Political Constitution of the Republic of Ecuador, paragraph 1.

An *amparo* action also may be lodged against individuals when their conduct seriously and directly harms a community or collective interest or a general right [*derecho difuso*].²⁰

60. Based on the information received by the Commission, the purpose of the domestic remedy filed by the affected parties was to prevent, impede, and put an end to activities or actions that, beginning in November 2002, were taking place in the ancestral territory of the Sarayaku community and, according to the petitioners, in contravention of international and domestic norms regarding the rights of indigenous peoples.

61. For its part, the remedies identified by the State, which in its opinion should have been exhausted by the petitioners, emanated from the oil concession contract signed in 1996, in other words, six years before the events that led to the action of *amparo*.

62. The Commission observes that the suitable remedy in Ecuadorian law applicable in this specific case is the remedy of *amparo*. The foregoing is based on the beginning of the events or actions that, according to the petitioners, affected the fundamental rights of the Kichwa indigenous people of the Sarayaku community and its members.

63. As stated earlier, the remedy of *amparo* is intended to put an end to, prevent the commission of, or immediately rectify the consequences of an illegal act or omission by a public authority, whether acting directly or through others in representation or by concession, that is violating or could violate any right enshrined in the Constitution or in an international treaty or covenant in force and threatens to cause imminent serious harm.

64. Based on Ecuadorian constitutional law, the remedy of *amparo* may be directed against individuals when their conduct seriously or directly harms a community or collective interest or a general right [*derecho difuso*]. In the case at hand, the remedy of *amparo* is based on Ecuadorian constitutional law and was filed against the CGC oil company, which by virtue of holding a concession contract, was acting in representation of the State.

65. Having established that the remedy of *amparo* was the adequate remedy to rectify the situation denounced, it is necessary to analyze the petitioner's claim that they satisfied the requirement of exhaustion of domestic remedies. Article 46(2)(a) of the Convention establishes that this requirement shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging the violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been an unwarranted delay in rendering a final judgment under the aforementioned remedies.

²⁰ Article 95 of the Political Constitution of the Republic of Ecuador, paragraph 3. In this regard, Dr. Berenice Pólit Montes de Oca, assistant to the Ecuadorian Constitutional Court, in her article on "The Passive Legitimization of the Action of Amparo and the Protection of General and Collective Rights" states that under Article 95 of the Political Constitution of the Republic, the *amparo* remedy is admissible when companies, private organizations and even individuals affect or harm any of the collective rights contained in Articles 83 to 92 of the Constitution, and adds: "We also speak of passive legitimization when we refer to individuals acting in representation of or by concession of a public authority who commit the illegal act, when their actions are extensions of attributes that have been conceded or delegated and when they have failed to adhere to the lawful procedures and lack the proper motivation and basis." Later she says, "When private entities (companies) abuse the rights of communities of indigenous peoples, blacks or afro-Ecuadorians, we are facing a violation of collective rights recognized in the Political Charter, (Art. 83 such as the right to identity, to inalienable ownership of community lands, the use, usufruct, and conservation of their lands, etc.; these rights also are enshrined in ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries which, in accordance with Art. 163 of the Constitution, are part of our Ecuadorian Law." See: derechoecuador.com

66. The petitioners filed the *amparo* suit on November 28, 2002,²¹ and the following day, that is November 29, 2002, the First Instance Judge for Civil Matters of Pastaza decided to process the constitutional remedy of *amparo*, schedule a public hearing for December 7, 2002, and order the suspension of "any current or imminent action that affects or threatens the rights contained in the complaint."²²

67. Based on Ecuadorian Constitutional Law, once an *amparo* remedy is lodged, a public hearing must be held at once to hear the parties.

The judge shall assemble the parties immediately to hear them in a public hearing within the next twenty-four hours and, at the same time, where warranted, shall order the suspension of any act that could translate into a violation of a right.²³

68. The hearing was scheduled in the first resolution that had bearing in the *amparo* case, that is, on November 29, 2002, for December 7, 2002. However, according to the information provided by the petitioners, the hearing was not held on the date ordered by the court due to anomalies in the notification procedure, and it has not been held to date.

69. The Ecuadorian Political Constitution establishes that the remedy of *amparo* must be processed on an urgent basis and resolved within 72 hours.

Within the next forty-eight hours, the judge shall issue a ruling that shall be executed immediately, although the ruling may be appealed to the Constitutional Court which may uphold or vacate it.²⁴

70. Nonetheless, in the case at hand, 23 months have transpired since the date the *amparo* suit was filed, without a resolution by a competent authority. For the purposes of Article 46 of the American Convention, this situation constitutes an unwarranted delay in resolving the remedy.

71. Therefore, given the characteristics and context of the present case, the Commission believes that the exception set forth in Article 46(2)(c) of the American Convention is applicable, in addition to certain considerations relating to the potential effectiveness of the available remedies, for which the requirements set forth in the American Convention regarding the exhaustion of domestic remedies and, therefore, the six-month period for the lodging of the petition, are not applicable.

72. It only remains to be said that invoking the exception to the requirement of exhaustion of domestic remedies set forth in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights enshrined therein, such as the right to access to justice. Nonetheless, Article 46(2), by its nature and purpose, is a norm with autonomous content *vis á vis* the substantive norms of the Convention. Therefore, the determination of whether exceptions to the rule of exhaustion of domestic remedies set forth in subparagraphs (a), (b) y (c) of that norm are applicable to the case at hand should be conducted prior to and separately from the analysis of the merits of the matter, since it must be evaluated using a different yardstick than that used to determine the violation of Articles 8 and 25 of the Convention. It should be noted that the causes and effects that prevented the exhaustion of domestic remedies will be examined in the IACHR's Report on the merits of the dispute, in order to establish whether they constitute violations of the American Convention.

21 Document in the file.

22 Document in the file.

23 Article 95 of the Political Constitution of Ecuador, paragraph five.

24 Article 95 of the Political Constitution of Ecuador, paragraph six.

B. Duplication of proceedings and *res judicata*

73. The file does not indicate that the subject matter of the petition is pending settlement in any other international proceeding, nor does it indicate that it reproduces a petition that has already been examined by this or any other international organization. Therefore, the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been satisfied.

C. Colorable claim

74. The Commission believes that the acts denounced by the petitioners regarding 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. Moreover, there is no evidence of a lack of merits or inadmissibility of the petition lodged. Therefore, the Commission believes that the requirements established in Article 47(b) and (c) of the American Convention have been satisfied.

75. Likewise, the Commission believes that the acts denounced in the petition do not contain sufficient elements to claim a violation of Articles 3 and 4 of the American Convention.

V. CONCLUSIONS

76. The Commission rejects the objection regarding the exhaustion of domestic remedies lodged by the Ecuadorian State and concludes that it is competent to examine the claims submitted by the petitioners concerning the alleged violation of Articles 4, 5, 7, 8, 12, 13, 16, 19, 21, 22, 23, 24, 25, 26 relative to Articles 1(1) and 2 of the American Convention and that the petition meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention.

77. Based on the foregoing arguments, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, DECIDES:

1. To declare the petition admissible with respect to Articles 4, 5, 7, 8, 12, 13, 16, 19, 21, 22, 23, 24, 25, 26, 1(1) and 2 of the American Convention.
2. To declare the present petition inadmissible with respect to article 3 of the American Convention.
3. To advise the Ecuadorian State and the petitioner of this decision.
4. To continue to analyze the merits of the case.
5. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in Washington, D.C. on the 13th day of the month of October, 2004. (Signed): Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez Trejo, and Florentín Meléndez.