

• • • • • • • • • • • •

CINE, FELANUMA, *ET AL.* (PETITIONERS)

v.

THE STATE OF ESMERALDA (RESPONDENT)

**MEMORIAL FOR THE COMMISSION**

**Team No. 84**

• • • • • • • • • • • •

**TABLE OF CONTENTS**

**Index of Authorities.....iv**

**Statement of Facts.....vii**

**Legal Analysis**

**I. JURISDICTION OF THE COURT.....1**

    A. Exhaustion of Domestic Remedies.....1

    B. Timeliness.....2

**II. THE STATE’S SANTA ANA PROJECT THREATENS SERIOUS AND  
PERMANENT DETRIMENT TO THE ENVIRONMENTAL HEALTH  
AND QUALITY OF NUMA TERRITORY IN VIOLATION OF  
RIGHTS TO A HEALTHY ENVIRONMENT UNDER THE SAN SAL-  
VADOR PROTOCOL ARTICLE 11.....2**

    A. Human Rights Guarantees to Health and Healthy Environment.....2

    B. Special Protections for Indigenous Peoples’ Environmental Rights.....3

    C. Case Histories of Environmental Degradation from Petroleum Extrac-  
tion.....4

D. Conclusion.....14

**IV. THE STATE’S PROPOSED SANTA ANA PROJECT AND ITS INACTION IN RECOGNIZING NUMA INDIGENOUS STATUS ENDANGER THE CULTURAL EXISTENCE OF THE NUMA PEOPLE IN VIOLATION OF THE DECLARATION ARTICLE XIII .....15**

A. Rights to Culture in International Human Rights Instruments.....15

B. Particular Rights of Indigenous Peoples to Preserve Their Culture.....16

C. Threats to Numa Cultural Rights from SAP.....17

    1. *Cultural Loss from Destruction of Traditional Livelihood and Economic Base*.....17

    2. *Loss from Accelerated Cultural Attrition*.....18

    3. *Loss from Permanent Cultural Dilution*.....18

    4. *Loss from State Action and Inaction*.....19

D. Conclusion.....19

**V. THE STATE VIOLATED ARTICLES 1, 23, AND 25 OF THE CONVENTION WITH RESPECT TO THE LACK OF ADEQUATE PARTICIPATION AND JUDICIAL PROTECTION AFFORDED THE NUMA IN THE APPROVAL OF THE SANTA ANA PROJECT.....20**

A. State Failure to Provide Sufficient Consultation and Participation in the Approval of SAP Violated Numa Rights under Article 23 of the Convention .....20

B. The State Has Provided Insufficient Protection of the Numa’s Rights Regarding SAP and Its Effect on Their Communities, Violating Their Right to an Adequate Remedy in Law.....24

C. Conclusion .....27

**VI. THE STATE VIOLATED ARTICLES 3 AND 23 OF THE CONVENTION WITH RESPECT TO THE RECOGNITION OF THE NUMA PEOPLE AND THE FAILURE TO DEMARCATATE AND GRANT THEM LEGAL TITLE TO THEIR LANDS PRIOR TO THE IMPLEMENTATION OF THE PROJECT.....27**

A. The State’s Failure to Recognize the Numa People and to Demarcate and Grant Them Legal Title to Their Lands Violated Their Right to a Judicial Personality.....28

B. The Failure of the State to Recognize the Numa People and to Demarcate and Grant Title Prior to the Implementation of SAP Denied Them Their Right to Participate as Guaranteed in the Convention, Article 23.....31

C. Conclusion.....32

**VII. PROVISIONAL MEASURES ARE NEEDED TO AVOID GRAVE AND IRREVERSIBLE DAMAGE TO THE NUMA’S PHYSICAL ENVIRONMENT, MEANS OF SUBSISTENCE, AND CULTURAL INTEGRITY.....33**

A. Authority and Standard for Granting Provisional Measures.....33

B. Conditions Warranting Measures in This Case.....33

C. Analogous Precedent Supports the Granting of Provisional Measures.34

D. Conclusion.....35

**Request for Relief.....35**

## INDEX OF AUTHORITIES

### **CASES AND REPORTS**

#### **Inter-American Court of Human Rights**

Inter-Am. Ct. H.R., <i>Abella v. Argentina</i> , Case 11.137, OEA/Ser.L/V/II.98, doc. 7 rev. (1997).....	1, 21
Inter-Am. Ct. H.R., <i>Mayagna (Sumo) Awas Tingni Community v. Nicaragua</i> , Judgment of August 31, 2001, Ser. C, No. 79 .....	4, 10, 11, 17, 25, 27, 30, 31
Inter-Am. Ct. H.R., <i>Order on Provisional Measures Requested by the Awas Tingni Community</i> , September 6, 2002, Ser. E.....	12, 34, 35

#### **Inter-American Commission on Human Rights**

IACHR, Fourth Report on the Situation of Human Rights in Guatemala, June 1, 1993..	14
IACHR, The Human Rights Situation of Indigenous Peoples in the Americas, OEA/Ser.L/V/II.108, doc. 62 (2000).....	14, 15, 18
IACHR, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc.10 rev. 1 (1997).....	4, 5, 18
IACHR, Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106 doc. 59 rev. (June 2, 2000).....	22
IACHR, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983) .....	14, 15, 19
IACHR, Resolution N <sup>o</sup> 12/85, Case N <sup>o</sup> 7615 (Brazil), March 5, 1985.....	4, 14, 18

#### **European Court of Human Rights**

Eur. Ct. H.R., <i>Bentham Case</i> , Judgment of October 23, 1985, Series A, No. 97.....	2
--	---

#### **African Commission on Human and People's Rights**

Afr. C.H.P.R., <i>SERAC &amp; CESR v. Nigeria</i> , Communication 155/96, 15th Annual Activity Report (2001-02) .....	6, 23
---	-------

### **STATUTES AND RULES**

#### **Constitution and Statutes**

1972 Constitution of Esmeralda.....	vii, ix, xii, 11, 13, 16, 26, 28, 29
Law 555-76 (1976) .....	vii, viii, xii, 11, 24, 28-29
Law for Development of Hydrocarbon Resources .....	ix

**Rules**

Rules of Procedure of the Inter-American Court of Human Rights (2003)..... 1, 2, 33

**TREATIES AND OTHER INTERNATIONAL INSTRUMENTS**

African Charter on Human and Peoples' Rights .....	2, 6, 9, 15, 23
American Convention on Human Rights.....xii-xiv, 1, 2, 4, 9-11, 15, 19, 20-25, 27, 28, 31-33	
American Declaration of the Rights and Duties of Man..... xii-xiv, 1-4, 9, 15, 24, 25, 28	
Carta Internacional Americana de Garantías Sociales (1948) .....	3, 18
Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 135, U.N. GAOR, 47th Sess., Supp. 49 at 210, U.N. Doc. A/RES/47/135 (1992) .....	16
Draft U.N. Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/RES/1994/45 (1994).....	3, 9, 10, 12, 13, 14, 16, 17, 28, 29
European Framework for the Protection of National Minorities, February 1, 1995, E.T.S. No. 157 .....	18
ILO Convention No. 169 (Indigenous and Tribal Peoples Convention) viii, xii, xiii, 3, 10-14, 16, 17, 20-22, 24, 25, 28, 32	
Inter-American Democratic Charter .....	xiii, 3, 15, 16
International Convention on the Elimination of All Forms of Racial Discrimination .....	15
International Covenant on Civil and Political Rights .....	3, 9, 15, 20, 22, 28, 32
International Covenant on Economic, Social, and Cultural Rights .....	3, 9, 15
Proposed American Declaration on the Rights of Indigenous Peoples, OEA/Ser.L/V/II.95, doc. 7 rev. (1997).....	3, 9, 10, 12-14, 16, 17, 24, 28
Protocol to the Convention on Economic, Social, and Cultural Rights.. xiii, xiv, 1, 2, 4, 15	
Rio Declaration on Environment and Development, Principle 22, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (1992).....	3
U.N. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.....	3
U.N. Declaration on the Right to Development, G.A. Res. 128, UN GAOR, 41st Sess., Supp. 53 at 186, UN Doc. A/RES/4/128 (1986) .....	9
Universal Declaration of Human Rights .....	9, 15
World Bank Operational Directive 4.20 (1991) .....	18

**ARTICLES**

Judith Kimerling, <i>Disregarding Environmental Law: Petroleum Development in Protected Natural Areas And Indigenous Homelands in the Ecuadorian Amazon</i> , 14 HAST. COMP. & INT'L. L. REV. 849 (1991).....	6-8
Judith Kimerling, <i>Rio+10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia</i> , 27 COLUM. J. ENVIR'L. L. 523 (2002).....	6

Gerald P. Neugebauer III, *Indigenous Peoples As Stakeholders: Influencing Resource-  
Management Decisions Affecting Indigenous Community Interests in Latin America*, 78  
UNIV. L. REV. 1227 (2003) ..... 6

B. Oxman & D. Shelton, *Decision Regarding Communication 155/96*, 96 AM. J. INT'L L.  
937 (2002)..... 2, 6

Inara K. Scott, *The Inter-American System of Human Rights: An Effective Means of  
Environmental Protection?*, 19 VA. ENVTL. L. J. 197 (2000) ..... 8

Robert A. Williams, *The Protection of Indigenous People's Rights Over Lands and  
Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM.  
RTS. J. 33 (2001).....22, 31





- “originating from, and identifying themselves with, a native people.” They must have a common culture and language, and must occupy ancestral lands while maintaining their traditional institutions and government. Recognized groups are entitled to demarcation of, and title to, lands they have settled and worked to support their social, physical, and cultural survival. The Law requires the State adopt all measures necessary to safeguard the rights and resources necessary for survival, and sets up a procedure for consultation intended to comply with the requirements of the ILO Convention No. 169 (Indigenous and Tribal Peoples Convention) [ILO C169], as interpreted by the ILO Committee of Experts.
3. Under Law 555-76, the Lanta were officially recognized in 1985 after a 30-month process and accorded collective land rights. The State also provided basic health care, bilingual primary education, and internal autonomy as to justice and law enforcement.
  4. On the other hand, the Numa’s efforts since 1995 to secure official recognition have been rebuffed. In administrative proceedings, the Numa’s claim was rejected because: they were considered a recent off-shoot of the Lanta; the Numa had relocated to an area outside the Lanta reservation, in a nature reserve; three communities of non-indigenes had settled in the same area; and the Lanta government had accepted the boundaries delineated in 1985. The process of recognition has continued, however, with frequent delays, as each side has sought to marshal more research for its case. To date the Numa enjoy none of the benefits of recognition

## II. The State's Santa Ana Project.

5. The 1972 Constitution transferred ownership rights to subsoil resources in Esmeralda to the State. During the 1970s, studies indicated that large oil and natural gas deposits may exist in the Santa Ana River basin in the area occupied by the Numa and Lanta. Under the 1995 Law for Development of Hydrocarbon Resources, the State established a system for granting concessions to extract oil and gas resources nationalized by the State. The procedures prior to awarding a concession require the concessionaire to prepare an environmental and social impact assessment (ESIA) detailing the expected consequences and indicating mitigation measures for adverse effects to the area in order to protect community rights and the environment. After the ESIA is submitted to the Ministry of Development and Energy (MIDSEEN), a four-month public comment period begins. After final approval of the ESIA by MIDSEEN, seismic prospecting will be conducted to determine the size of the deposits, followed by erection of camps, drilling rigs, storage and refining plants, and dedication of rights of way for oil and gas pipelines.
6. In 1998, the State adopted a National Energy Plan which identified the Santa Ana River basin as a site for concession under the Hydrocarbon Law. The Santa Ana Project (SAP) was proposed for an area of 100,000 hectares overlapping both sides of the Santa Ana River and including a portion of the nature preserve occupied by the Numa, as well as a portion of Lanta territory. SAP specifications envision seismic prospecting over the entire area and direct occupation of about 1,000 hectares: 300 for drilling; 100 for pipelines; and 600 for the workers' camp, storage, and refining. The camp will be built adjacent to the Lanta territory on the

River. Because of unsuitability for road building, the Santa Ana River will be used as the main transportation route. A pipeline is planned to extend over the mountains to the coast. The terms and conditions of bidding on the SAP concession included an assessment of environmental issues and the rights of affected indigenous communities.

### **III. Implementation of the Santa Ana Project.**

7. In June, 2000, the State accepted the bid of Intertropic Group, a consortium of domestic and transnational companies, to develop SAP.
8. Only after award of the concession, Intertropic and the State began consultation with groups representing indigenous communities in the area affected by SAP, including Confederacion Indígena Nacional de Esmeralda (CINE), the League of Lanta Communities (LILANTA), and FELANUMA, an association of Lanta and Numa of which most Numa communities are members. The public consultations were held in various indigenous communities under the auspices of local leaders and included participation of representatives of the Numa Council. Officials of the State and Intertropic attended these meetings and discussed the details of SAP, including planned safeguards, resulting temporary and permanent damage to the environment, compensation procedures for damage to land use, installation of the pipeline, camp construction, and temporary damage to the Numa and Lanta economic base in hunting and fishing and to their forest and water resources.
9. During the meetings, the indigenous groups objected frequently to SAP as harmful to their traditional activities and livelihood. The Numa Council in particular

- expressed hostility toward SAP and could not achieve consensus regarding it, but a majority opposed SAP and supported taking legal action to stop its implementation.
10. Following the consultations, Intertropic finalized its ESIA in March 2001 and submitted it for public comment. During the four-month comment period, FELANUMA, CINE, and other environmental and indigenous peoples' groups expressed strong opposition to SAP. FELANUMA argued that the State erred in soliciting bids on SAP before it was prepared to ensure the rights of the affected groups. Citing the irreparable harm to the ecosystem and to the communities themselves, FELANUMA charged that the project violated the groups' rights to self-determination and to property and threatened their very existence. Instead, it proposed a delay in implementing SAP until the State had negotiated directly with the Numa and Lanta and established measures to protect their rights and the environment.
  11. Despite these objections, MIDESEN approved the ESIA in August 2001, giving Intertropic the green light to proceed with SAP.

#### **IV. Numa Opposition to the Project.**

12. The Numa, represented by FELANUMA, along with CINE and other activist groups, petitioned the government in October 2001 to revoke approval of the ESIA because of the permanent damage to indigenous rights and irreparable harm to their property arising from SAP. In particular, the petition cited the delay in recognizing the Numa as denying them legal status and title to their land. The

- haste and lack of groundwork for approval of the complex issues in the ESIA were also noted. MIDESEN denied the petition in December 2001.
13. The petitioners filed suit in Federal Court in February 2002, claiming violations of the Constitution, Law 555-76, the American Convention on Human Rights [Convention], the American Declaration of the Rights and Duties of Man [Declaration], and ILO C169, all of which are binding domestic law in Esmeralda. Petitioners stressed the prejudice to the Numa's interests from failure to recognize them and settle their boundaries, to denying them due process of law. Petitioners sought an injunction to avoid irreparable harm from the inroads of new settlers occasioned by the project and the destruction of the Numa's environment. The court denied the injunction on April 10, 2002, and dismissed the suit on September 18, 2002.
  14. The case was appealed to the Court of Appeals and on October 30, 2002, the court granted the injunction until the administrative process on Numa recognition was complete. The court also revoked the approval of the ESIA on the ground that the recognition of the Numa should have been resolved first to preserve their eventual full participation in the decision making. The court also ordered the recognition of the Numa.
  15. The State appealed this decision to the Supreme Court, arguing approval of SAP did not interfere with the recognition process of the Numa; there was insufficient evidence that SAP would endanger the communities' livelihood or welfare; and that enjoining SAP would infringe the State's right to develop the resources

needed to benefit the economy and other sectors of society, whose larger numbers justified favoring their interests. The Supreme Court ruled in favor of the State. While acknowledging the constitutional and statutory protections for indigenous peoples, including a right to compensation and restitution for “unnecessary damage,” the court found allegations of damage speculative, because the State had observed these protections. It reversed the decree of recognition of the Numa, saying this was a matter for the Executive, and finding there was no evidence of non-compliance with the law. It held that the Numa had sufficiently participated in the consultations with the assistance of FELANUMA.

16. The Numa and their allies brought a petition before the Inter-American Commission for Human Rights on January 2, 2003. They alleged the damage to environment and culture flowing from SAP violates Articles 5 and 21 of the Convention, Articles XI and XIII of the Declaration, and Articles 10 and 11 of the Protocol to the Convention on Economic, Social, and Cultural Rights [San Salvador Protocol]. The inadequate consultation process on the ESIA, including failure to make special provisions for preparing the indigenous populations to consider the issues, violated Articles 1, 16, 23, and 25 of the Convention. The failure to recognize the Numa and to demarcate their boundaries violated Articles 3 and 23 of the Convention. Furthermore, in light of the State’s commitments under ILO C169—particularly Articles 5, 6, 7, 13, 14, 15, and 16—and the Inter-American Democratic Charter, the special rights of indigenous people would be violated by continuing with SAP. Petitioners asked the Commission to indicate provisional measures halting SAP until Numa recognition was decided.



## **LEGAL ANALYSIS**

### **I. JURISDICTION OF THE COURT.**

This Honorable Court has jurisdiction to hear this case. The State of Esmeralda is a Member State of the Organization of the American States and has fully ratified all instruments of the Inter-American System.<sup>1</sup> The State has accepted the compulsory jurisdiction of the Inter-American Court of Human Rights.<sup>2</sup>

#### A. Exhaustion of Domestic Remedies.

Pursuant to Article 46 of the American Convention and Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights, the petitioners have exhausted all domestic remedies.

The petitioners' case, alleging violations to their land and political rights, went through the entire judicial process, and the Supreme Court di



been denied recognition.<sup>4</sup>



A healthy environment is the key to the enjoyment of all other rights of indigenous groups. Because of the intimate connectio

which have polluted the water, soil, and air. Contamination arises from “improper treatment and disposal of toxic wastes, collapsed or leaching waste pits, and oil spills.”<sup>19</sup> The locals’ lives are crucially affected by surface water and aquifer pollution, as they depend on these sources for all personal uses, and for watering livestock and wildlife on which their livelihoods depend. Untreated burn-offs of natural gas, a by-product of all oil extraction, have polluted the air, and waste crude is used for dust control on the access roads, leading to direct contact exposure to people walking on the roads.<sup>20</sup> These environmental insults have led to reports of serious health conditions (skin diseases, rashes, chronic infection, gastrointestinal problems, and chronic infantile diarrhea) at levels in excess of those found in areas not adjacent to the oil fields.<sup>21</sup> Locals report increasing difficulty in securing adequate subsistence from the fish and wildlife critical to their nutrition. The Commission has observed environmental deterioration is inherent in petroleum mining:

Oil development and exploitation do, in fact, alter the physical environ-

proposed here, is seen in the recent ground-breaking decision by the African Commission on Human and Peoples' Ri

sums up the *human* effect of these environmental impacts in Ecuador thus:

Petroleum development is fueling what could become the final conquest of Amazonia. The oil boom accelerates the destruction of Oriente cultures and undercuts traditional indigenous economies and land rights. Without control over their lands, indigenous people will not be able to adapt in their own ways to a changing world. Loss of land and oil pollution also threaten the health and, in some cases, the physical survival of these people.<sup>29</sup>

D. Proof of Prospective Harm to the Numa People Flowing from SAP.

In light of the inherent nature of the product and process of petroleum extraction and the case histories from different continents showing oil drilling leading to long-lasting and devastating effects on the environment, health, and livelihood of local populations, there can be little doubt that the same sorts of deprivation will inherently follow in the wake of the State's Santa Ana Project [SAP].<sup>30</sup>

Because SAP has not yet been fully implemented, much of the damage to Numa life, land, and culture is currently prospective only. Yet the consistent course of other case histories shows that the envisioned harm is inevitable. To all appearances SAP will utilize the same facilities and operational techniques typical of the petroleum indus-

---

*Indigenous Peoples As Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America*, 78 *UNIV. L. REV.* 1227, 1227-32 (2003) ["Those familiar with the indigenous rights movement in Latin America know all too well how petroleum development can subject local indigenous populations to deplorable atrocities of grave proportions."]; Judith Kimerling, *Rio+10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 *COLUM. J. ENVIR'L. L.* 523, 532-82 (2002).

<sup>29</sup> Kimerling, *Disregarding Environmental Law*, *supra* note 28, at 877.

<sup>30</sup> In addition, the State's own ESIA concedes temporary disruption of local wildlife and water resources, as well as more long-term environmental alteration due to the pipeline installation. Clarification ¶ 8.

try,<sup>31</sup>

the same facilities and activities documented in the Oriente and Ogoniland cases, which led to habitat loss, pollution from leaching and spills, and wide-spread health problems from exposure. Although seismic prospecting has presently been completed,<sup>32</sup> it is still unclear how large an area will ultimately be affected. In any event, even seismic prospecting, the seemingly least intrusive part of the entire process, can lead to significant environmental impacts on indigenous lifestyles.<sup>33</sup> And as the other case histories also clearly demonstrate, because of the enforcement difficulties involved, even good faith promises by the State to protect indigenous groups and to monitor concessionaires' compliance with regulations ar



**III. THE STATE'S SANTA ANA PROJECT VIOLATES THE RIGHT TO PROPERTY UNDER ARTICLE 21 OF THE AMERICAN CONVENTION BY FAILING TO RESPECT GENERAL AND SPECIAL INDIGENOUS PROTECTIONS TO USE AND ENJOYMENT OF THE LAND.**

A. The Right to Use and Enjoyment of Property.

The Convention recognizes that “[e]veryone has a right to the use and enjoyment of his property.”<sup>36</sup> While this right may be subordinated to the interests of society, no one can be thus deprived of prope

right to recognition of their communal and other traditional land tenure forms.<sup>40</sup> Second, in view of the dependence of indigenous peoples on a healthy environment for their survival (*See* Argument II *supra.*), they have specially recognized rights as regards development in their territory.<sup>41</sup> Third, in recognition of their unique connection to the land, they have a right of return to lands traditionally occupied if removed there from.

title in customary indigenous law,<sup>45</sup> the Court found the Awas Tingni had a right under Article 21 to have their traditional territory respected by the government through its withholding development concessions until the legal status and land boundaries of the Awas Tingni were settled.<sup>46</sup>

C. Violations of Numa Property Rights by the State.

Like Nicaragua in *Awas Tingni*, the State here has bound itself legally to recognize the Numa traditional land tenure forms.<sup>47</sup> The domestic law of Esmeralda is thus consistent with this Court's interpretation of Article 21 of the Convention. The State must therefore, under the binding effect of these provisions and ILO C169, recognize the special indigenous rights regarding traditional tenure, resource development, and rights of return.

*1. Failure to Recognize Traditi*

rights, since it is still uncertain where those rights extend to. Before legal title is granted, it is likewise impossible to determine the extent of impingement on Numa riparian rights along the Santa Ana River, slated to be the main thoroughfare for development.<sup>48</sup> The State's action directly impairs Numa rights to occupation and use of the land's resources for their own livelihood. (*See* Argument II *supra*.) Finally, delay in recognition threatens massive confusion in determining respective rights and obligations later on, when it may result in *de facto* forfeiture of many of those rights and protections.<sup>49</sup>

## 2. Failure to Provide Special Protections Regarding Resource Development.

The inadequate consultation procedure and the delay in recognition also violate the Numa's right to particular protection and control as regards to the use of the natural resources on their lands. (*See* Arguments V and VI *infra*.) Lack of formal recognition has deprived the Numa of a proper voice during the State's approval of the ESIA, contrary to the special measures which should be emplaced for indigenous groups during resource allocation decisions.<sup>50</sup> Far from providing enhanced protections in this regard, the State has in fact violated domestic law by not respecting the importance of conservation of cultural values and guaranteeing the presence of, and traditional use by, indigenous communities in areas set aside as natural reserves.<sup>51</sup>

3. Denial of the Right of Return to Traditional Territories or Compensation.

The failure to complete the process of official recognition also skews the determination of the proper range of Numa territory.

#### D. Conclusion.

The Commission has previously recognized “[t]hat for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states.”<sup>56</sup> Failure to settle claims on indigenous status and rights has led in the past to “a situation of inevitable economic dependence on the Government, as they have been deprived of their traditional means of subsistence....”<sup>57</sup> SAP will impair irremediably the Numa’s ability fruitfully to use their traditional lands in their customary, communal fashion.

Nor does it matter that the Numa are only a small portion of the national population: “From the standpoint of human rights, a small corn field deserves the same respect as the private property of a person that a bank account or a modern factory receives....”<sup>58</sup> Protection of intrinsic rights of the small and powerless indigenous populations against the often entirely separate economic interests of the “civilized” majority is precisely the purpose of guaranteeing to indigenous peoples full and equal enjoyment of all human rights.<sup>59</sup>

---

the original expropriation of Numa subsoil property rights under the 1972 Constitution. Articles 15 and 16 of ILO C169, however, oblige the State to provide full compensation for such deprivation.

<sup>56</sup> Yanomami Case, Considerations, ¶ 8. The Yanomami Case represented “the first time an inter-governmental organization had issued a resolution requesting...demarcation” of traditional indigenous territory. IACHR, *The Human Rights Situation of Indigenous Peoples in the Americas*, ch. III, Part I, Section 2, OEA/Ser.L/V/II.108, doc. 62 (2000) [Indigenous Peoples Report].

<sup>57</sup> IACHR, Report on the Situation of Human Rights of a Segment of the Nicaraguan



of the right to participate in culture is the right to preserve and transmit one's culture.<sup>65</sup>

### B. Particular Rights of Indigenous Peoples to Preserve Their Culture.

The State is obliged to give particular protection to indigenous cultures. The 1972 Constitution<sup>66</sup> recognizes indigenous groups and acknowledges their national cultural importance is to be “valued, respected and protected by law.” The promotion and protection of the human rights of indigenous peoples is identified as key to promoting democracy in the Inter-American Democratic Charter.<sup>67</sup> Preservation of and respect for the culture and customs of indigenous populations is mandated in ILO C169.<sup>68</sup> Agreements relating to indigenous people in fact call on all states to provide special measures in order to protect the particularly endangered indigenous cultures.<sup>69</sup>

---

guaranteed); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(vi) (1965) (prohibits racial or ethnic discrimination in protecting the right to equal participation in cultural activities). *See also* African Charter on Human and People's Rights, art. 17(2) (1981).

<sup>65</sup> Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 1(2), G.A. Res. 135, U.N. GAOR, 47th Sess., Supp. 49 at 210, U.N. Doc. A/RES/47/135 (1992). This instrument requires that “states shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.” This includes adopting appropriate legislation and other measures.

<sup>66</sup> 1972 CONST. art. 19.

<sup>67</sup> Inter-American Democratic Charter, art. 9.

<sup>68</sup> ILO C169, arts. 2(2)(b); 4(1); 5(a) and (b); 7(1); 23(1); and 27(1); The Proposed American Declaration recognizes the centrality of cultural rights for indigenous peoples in Article II(2), the right against forced assimilation in Article V, and the right to cultural integrity—including respect and recognition of indigenous customs and traditions—in Article VII. Similarly, the UN Draft Declaration contains numerous provisions respecting the rights to practice and maintain indigenous culture and traditional social structures. (arts. 3-5, 7(a) and (d), 8, 9, 12, 14, 21, 29, 31, 32.)

<sup>69</sup> ILO C169, art. 4(1); Proposed American Declaration, art. VI; UN Draft Declaration, art. 22.



C. Threats to Numa Cultural Rights from SAP.

The State's approval of SAP invades both the general cultural rights of the Numa and the specific, special protections due them as an indigenous group.

1. Cultural Loss from Destruction of Traditional Livelihood and Economic Base.

The physical development of infrastructure necessary for SAP, including occupation of land for drilling wells, setting up worker camps, storage and processing facilities, and running of pipelines, all threaten to destroy the environment in the Numa territory. (*See* Argument II *supra*.) Such environmental deprivation will undermine traditional Numa subsistence livelihoods, which are dependent on conservation of natural resources in the flora and fauna of the region. The particular dependence of indigenous culture and lifestyle on the physical environment has been recognized in international human rights instruments, which also grant indigenous groups particular rights of self-determination regarding their lands and resources.<sup>70</sup> (*See* Arguments II and III *supra*.) This Court also recognized the intimate connection of environment and cultural integrity in the *Awat Tingni* case, where it concluded the right to property for indigenous peoples must include recognition of land tenure modalities traditional in their cultures.<sup>71</sup> Detriment to the environment and resources of an indigenous group like the Numa is a direct assault on the cultural and spiritual heritage of the group, undermining the ability to practice its culture in the present and to transmit that heritage to the future generations.

---

<sup>70</sup> ILO C169, arts. 4(1), 7(1) and (3), 13(1), 15; Proposed American Declaration, Preamble ¶ 3, arts. XIII, XVIII, XXI; UN Draft Declaration, arts. 7(b), 23, 25, 26, 28, 30, 31.

<sup>71</sup> *Awat Tingni*, ¶ 148.

### 2. Loss from Accelerated Cultural Attrition.

Opening the Numa lands to exploitation will expose the Numa to outside influences which threaten cultural erosion and will speed defection of younger generations to the dominant culture. Exposure to the technology and culture of the dominant community through contact with the imported work force threatens to undermine Numa traditional values and economic pursuits. Such has been the documented effect of dominant culture exposure in several other development scenarios similar to SAP.<sup>72</sup>

### 3. Loss from Permanent Cultural Dilution

The temporary use of the territory for petroleum extraction will inevitably lead to opening the region to permanent settlements by non-Numa groups, as shown again by previous cases.<sup>73</sup> Already three such communities have been established in the Numa territory,<sup>74</sup> but development will inevitably lead to further inroads. Settlement by non-Numa brings the same risks of dominant culture exposure as temporary workers, but on a continuing basis. It also threatens to 'dilute' the region as a Numa cultural zone, tipping the demographic makeup of the area by an inevitable increase in numbers of non-Numa im--18.325 -2.3 TdNe



The State's proposed project, combined with prior inaction on Numa recognition, threatens just such a cultural disaster.

**V. THE STATE VIOLATED ARTICLES 1, 23, AND 25 OF THE CONVENTION WITH RESPECT TO THE LACK OF ADEQUATE PARTICIPATION AND JUDICIAL PROTECTION AFFORDED THE NUMA IN THE APPROVAL OF THE SANTA ANA PROJECT.**

The State violated the rights of the Numa under Articles 1, 23, and 25 of the Convention.<sup>78</sup>



lows them to review and comment on the ESIA, but their opinions or complaints have no binding effect on the approval process.<sup>85</sup>

This plan of action violates the State's duties to the affected indigenous populations.<sup>86</sup> The Numa people have six communities that will be directly affected by the project.<sup>87</sup> SAP will also use the Santa Ana River as the primary means of transportation.<sup>88</sup> At a minimum, the rights in the Convention and ILO 169 require states to adequately weigh the concerns and interests of the indigenous peoples affected.<sup>89</sup> Also, when the right to consultation is mentioned, the conventions require that they be more than formalities or processes which are merely providing information about the development projects to the affected communities.<sup>90</sup> The Commission has also recommended that when developmental projects will affect an indigenous area or their habitat or culture, to be consistent with the ILO C169 the decision to implement such projects must be made with their participation, consultation, and with the view of obtaining their consent.<sup>91</sup>

During the short, four-month period proscribed in the law, the State did consult with the indigenous peoples, but it seems clear that four months is not adequate time to inform the tribes of such foreign intrusions on their land and what the harm to them will be. Even though the CINE, FELANUMA, and forest activists raised many objections to

---

<sup>85</sup> *Id.* ¶ 17.

<sup>86</sup> Convention, art. 23; ICCPR, art. 25(a); ILO C169, arts. 6, 7, and 15.

<sup>87</sup> Hypo 86



B. The State Has Provided Insufficient Protection of the Numa's Rights Regarding SAP and Its Effect on Their Communities, Violating Their Right to an Adequate Remedy in Law.

The Convention ensures the right of all people to effective and prompt judicial remedies for violations of their human rights.<sup>96</sup> Likewise the Declaration protects the right to adequate judicial relief.<sup>97</sup> The Proposed Declaration also confirms that indigenous peoples "have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands."<sup>98</sup>

On its face, the State has enacted Law 555-76 to protect indigenous peoples' rights.<sup>99</sup> The law also proclaims to be acting in accordance with ILO C169 when it outlines procedures for consultation when "... any program, project, plan, or measures ... could affect the rights of indigenous peoples."<sup>100</sup>

Although Esmeralda law provides for guarantees to respect the fundamental rights



of indigenous peoples, in practice, these rights are illusory and ineffective. This Court in the *Awas Tingni* case also referenced the rights for indigenous groups in Nicaragua's Constitution and laws, but found them to be insufficient in practice, and as such, futile in protecting the indigenous people's fundamental rights.<sup>101</sup> The Convention requires that not only must the rights be recognized by constitution or by law, but "it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it."<sup>102</sup> As mentioned above, the

vention, because when an entire community's existence is at stake, it seems that more than a "brief legal proceeding" is required to comply with the Convention.

Next, the groups petitioned the Court of Appeals. The Court of Appeals recognized the groups' rights and granted the injunction until the Numa people were recognized, stated that the recognition of the Numa people should have been accomplished before SAP was approved, and ordered the formal recognition of the Numa people.<sup>107</sup> It appears that the Court of Appeals acted in accordance with Esmeralda law and with international treaties.

This momentary recognition of the State's duties to the Numa was short-lived. The Supreme Court overturned the Court of Appeals, and said SAP doesn't interfere with the recognition of the Numa people, there is a lack of evidence that it will endanger the lives or welfare of village communities, SAP will particularly benefit the large urban population of Esmeralda, and the "alleged inconvenience caused by the Project to such a small percentage of population is justified, given its positive outcomes for the majority of the citizenry."<sup>108</sup> The Supreme Court also overturned the official recognition of the Numa People, stating that only the Executive could decide the matter.<sup>109</sup> Even though the Supreme Court acknowledges the Constitution and the laws protecting the indigenous people, it stated that any damages would be "speculative" before SAP begins.<sup>110</sup>

As a result, the Supreme Court failed to protect the rights of the indigenous populations, because the damage that will be caused is real and documented and the purpose

---

<sup>107</sup> *Id.* ¶ 36.

<sup>108</sup> *Id.* ¶ 37.

<sup>109</sup> *Id.* ¶ 38.

<sup>110</sup> *Id.*

of the laws is to empower the judiciaries to prevent damage from happening. The Supreme Court has a duty to provide an effective legal remedy to the indigenous peoples when their fundamental rights are violated, and here the Supreme Court failed to recognize that their rights were clearly being violated.<sup>111</sup> The Supreme Court's own statements emphasize that it was acting in the best interests of the State regardless of the impact on such a "small percentage of society." It is apparent that the laws in Esmeralda are like those of Nicaragua in *Awas Tingni*: perhaps sufficient on their face, but nonexistent in practice.<sup>112</sup> The Supreme Court's decision demonstrates the illusoriness and ineffectiveness of the laws and the failure of the judiciary to protect the fundamental rights of the Numa people.

### C. Conclusion.

Therefore, the State of Esmeralda violated articles 1, 23, and 25 of the Convention when it approved SAP without adequate participation from and judicial protection for the Numa peoples.

## **VI. THE STATE VIOLATED ARTICLES 3 AND 23 OF THE 0 Tw14.46c1uENTION Tc 0.0201 jEu**





have settled on an area designated as a “protected natural reserve,” instead of an area of the Lanta people, and that in 1985 the Lanta people accepted the boundaries that the government had designated for them as suitable for the survival of the Lanta people.<sup>123</sup> However, the Numa people had already separated from the Lanta people, so of course the boundaries that would be suitable for them would not include land needed for the survival of the Numa people. Also, Nicaragua tried to make similar claims with respect to the Awas Tingni group (not residing on historical land and of mixed origins), and this Court ruled that “possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property.”<sup>124</sup> The Court emphasized that this situation had created an atmosphere of uncertainty for the community that, subsequently, violated their rights under the Convention.<sup>125</sup>

The Numa people comprise one of the oldest tribal groups residing in Esmeralda.<sup>126</sup> The area where they now reside had traditionally been used by both the Lanta and Numa tribes, and now is used by the Numa.<sup>127</sup> The Numa’s governing body, the Numa Council, acts similarly to the Lanta General Assembly, though not as formal, and the government has sent representatives to the meetings on occasion.<sup>128</sup> Furthermore, the law for demarcation and recognition says “should reside” not “must reside” on historical grounds; this Court has found the requirement of permanency in land to be an unfair bur-

---

<sup>123</sup> *Id.* ¶ 12.

<sup>124</sup> *Awas Tingni*, ¶ 151.

<sup>125</sup> *Id.* ¶ 153.

<sup>126</sup> Hypo ¶¶ 8, 11.

<sup>127</sup> *Id.* ¶ 11.

<sup>128</sup> *Id.*

den on indigenous peoples.<sup>129</sup> These facts prove that the Numa meet all the requirements under Esmeralda law and international law to be recognized as an indigenous people.

The failure of the State and its judiciary to provide for the demarcation and recognition of the Numa people represents a difficult and threatening condition to their way of life and represents a continuous threat to their fundamental rights as a people.<sup>130</sup>

without such recognition. Article 23 of the Convention requires that all people be guaranteed the right to participate in their government. The ICCPR al



**VII. PROVISIONAL MEASURES ARE NEEDED TO AVOID GRAVE AND IRREVERSIBLE DAMAGE TO THE NUMA'S PHYSICAL ENVIRONMENT, MEANS OF SUBSISTENCE, AND CULTURAL INTEGRITY.**

A. Authority and Standard for Granting Provisional Measures.

This Court is empowered under Article 63(2) of the Convention to direct provisional measures in extremely grave and urgent cases where irreparable harm to persons could result.<sup>132</sup>

B. Conditions Warranting Measures in This Case.

As the discussion in Argument II above demonstrated, the effects documented in other case histories of development within indigenous peoples' territory—in Brazil, Ecuador, Nicaragua, and Nigeria—are long-term and sweeping in scope. Like other indigenous peoples, the Numa depend on their local environment completely for their subsistence. Dependent on hunting and gathering,<sup>133</sup> the Numa are at the mercy of forces that affect their environment. Loss of ecosystem health threatens not only immediate, direct hardship, but through loss of habitat forcing wildlife migration and outright extinction of fragile species from toxic pollution, the damage threatens to become permanent. Moreover, many of the Numa's other rights depend directly on the maintenance of environmental integrity, such as the right to practice their religion, which is affected by planned disruption of the land adjacent and leading to Numa sacred sites.<sup>134</sup> Petroleum development will open the transmontane area to further settlement by the non-indigenous. This

---

<sup>132</sup> Rules of Procedure of the Inter-American Court of Human Rights, art. 25(1) (2003). 98 4vA488 22697.68

threatens to create vested property rights in settled areas that could severely prejudice the Numa's interests in future boundary determinations and land titling. (*See* Arguments III and IV *supra*.)

The ESIA for SAP has been approved by the State and confirmed by administra-



(2) Order the State to give immediate official recognition of the Numa as an indigenous people;

(3) Order the State to restore subsoil resource rights to the indigenous groups affected by SAP or to provide full and fair compensation to the affected groups.