American University Washington College of Law
Center for Human Rights and Humanitarian Law

NINTH ANNUAL INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

CINE, FELANUMA, ET AL VS. STATE OF ESMERALDA

BENCH MEMORANDUM[1]

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(right to private property), 23 (political rights), and 25 (right to judicial protection) of the Convention; Article XIII (right to the benefits of culture) of the Declaration; and Article 11 (right to a healthy environment) of the Protocol of San Salvador. At the same time, it also considered inadmissible the allegations referring to Articles 5 (right to humane treatment) and 16 (right to association) of the Convention; Article XI (right to the preservation of health and well-being) of the Declaration; and Article 10 (right to health) of the Protocol of San Salvador.

On September 21, 2003, the Commission adopted its Report on the Merits in the case, finding that the facts alleged constituted violations of Articles 1(1), 3, 21, 23, and 25 of the Convention, Article XIII of the Declaration, and Article 11 of the Protocol of San Salvador. Accordingly, the Commission submitted a report in compliance with American Convention Article 50, recommending that the State of Esmeralda: (1) investigate and correct the circumstances constituting the violations; and (2) take the necessary measures to ensure full respect of the rights of the indigenous peoples affected, including suspending all the work previously authorized on the Santa Ana Project until the foregoing violations are corrected. The State did not respond to the Article 50 report.

It is expected that in their final written and oral arguments the teams will each focus on the main issues raised with respect to Articles 1(1), 3, 21, 23, and 25 of the Convention, Article XIII of the Declaration, and Article 11 of the Protocol of San Salvador. It is up to the participants to determine how to frame their positions.

The purpose of this memorandum is to delineate the main legal issues and arguments the pai617(e)7(y)1aw68(13)(r)y)1ak1ys08e ctedlee10.00440.7]TJ0 Tw -3.w1(e)-3(t1(ng)-2(a)h(s)5(2 Td[(C)-[o)4()-

both the United Nations and the OAS. In particular, Article 1(1) of the International Covenant on Civil and Political Rights, states "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

For indigenous peoples, the principle of self-determination establishes a right to control their lands and natural resources, and to participate genuinely in the whole process of decision-making that affects them. This is clear from the declarations of the Human Rights Committee of the United Nations in relation to the situation of the indigenous peoples of Canada, in which the Committee has noted "the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence."[6]

ILO Convention 169, at Article 7, provides as follows:

> 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
>
> 2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
>
> 3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
>
> 4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

The issue of respect for the right of self-determination lies at the base of the petition before the Inter-American Court. The recognition of "internal" self-determination arises from at least two sources in the Inter-American system: the rights recognized in the American Convention (among them the rights to association, juridical personality, and political rights) and in the American Declaration (among them the right to culture). The Draft Declaration on the Rights of Indigenous Peoples also addresses this right of self-determination. Another source has been the decision by the Court in the *Awas Tingni* case, in

[6] *Concluding Observations of the Human Rights Committee, Canada*, CCPR/C/79/Add. 105, para. 8 (April 7, 1999).

which it recognized the juridical personality, right to integrity, and right to communal property of that Mayagna group. Given that other international instruments have spoken

> [t]he most relevant international instrument is ILO Convention 169 on indigenous and tribal peoples, ratified by Peru on February 2, 1994. That Convention establishes obligations to consult and include the participation of indigenous peoples in respect of matters that affect them…On ratifying this instrument, the Peruvian State undertook to take special measures to guarantee the indigenous peoples of Peru the effective enjoyment of human rights and fundamental freedoms, without restrictions, and to make efforts to improve living conditions, participation, and development in the context of respect for their cultural and religious values.[16]

All of this jurisprudence would seem to permit using ILO 169 as an interpretive tool.

In *Las Palmeras Preliminary Objections*, the Inter-American Court articulated a general rule that contentious cases within the Inter-American system should refer to rights elaborated in the American Convention.

> Although the Inter-American Commission has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention (*cf.* Articles 33, 44, 48.1 and 48).[17]

The Court therefore distinguishes between the protocols for the analysis of the human rights situations within OAS member states by the Commission in its supervisory role and the analysis of contentious cases that are brought before the adjudicatory bodies of the Inter-American system. The application of Convention ILO 169 in the instant case, a contentious case culminating in an application before the Inter-American Court, would violate this rule.

There does exist, however, an exception to this rule, namely that a convention itself may confer competence on the Inter-American Court or Commission to hear violations of the rights protected by that convention.[18] This exception, however, does not cover ILO 169. Though Esmeralda ratified ILO 169, ILO 169 does not confer competence on the Inter-American Court or Commission to hear violations of the rights it purports to protect. Indeed, the ILO established the Committee of Experts as the adjudicatory body charged with judging violations of Convention ILO 169 and consideration of those violations should be reserved for that body.

C. Status of Indigenous Communities in National Protected Areas

It is important to note two other international treaties briefly here. The first is the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (hereinafter "Western Hemisphere Convention" or "WHC") and the other is the Convention on Biological Diversity (hereinafter "Biodiversity Convention"). The WHC is particularly relevant because it was created in the 1940s under the auspices of what is now

[16] *Id.* at para. 7.

[17] I/A Court H.R., *Las Palmeras Case Preliminary Objections*, Jud

the OAS. This makes it an Inter-American treaty of sorts and suggests that it was in effect in the 1970s when Esmeralda enacted its 1972 Constitution and when the Numa moved into the National Protected Area. The Biodiversity Convention in turn was signed by most countries in 1992 during the UN Conference on Environment and Development and would therefore cover questions of law raised contemporaneous with the administrative proceedings for Numa recognition, but nothing before that.

The WHC distinguishes among three types of reserves and applies different protective standards to each. The first is the national park, which, according to Article III, has set boundaries and un-exploitable natural resources. The second is the wilderness reserve, which, according to Article IV, permits scientific investigation, government inspection, or other uses consistent with the purpose for which the area was established. The third is a national reserve, which, under Article I, is different because it is not established for strict preservation, but rather "for conservation and utilization of natural resources under government control."

The Biodiversity Convention, although more recent, does not supercede the WHC.

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> whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.[39]

The spirit of consultation and participation is the cornerstone of ILO Convention 169, on which all of its provisions are based.[40] On the basis of this fundamental principle, the Committee of Experts of the ILO established a clear structure of application with respect to consultation and participation. While Article 6 does not require that one achieve consensus in the process of prior consultation, it does provide that the interested peoples should have the opportunity to participate freely at all levels in the formulation, implementation, and evaluation of measures and programs that directly affect them.[41]

The consultations required should not necessarily result in an agreement or in consent to the matter that is the subject of consultation, but rather express an objective for the consultations. Nonetheless, this should be considered in light of: (1) the right of indigenous peoples to decide their own priorities in relation to their development process, to the extent that it affects their lives, beliefs, institutions, and spiritual well-being, and the lands d had/(e)-3(s)5

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institutions of their own. Another element that is important but obviously not sufficient is self-identification as an indigenous people. This is precisely to keep any random group of persons from identifying themselves as indigenous, for spiritual reasons or reasons of material interest, to obtain benefits reserved to the ancestral peoples. The different countries of the Americas have different systems for recognizing indigenous peoples, but they generally follow the abovementioned standards.

An additional issue that is important in this case refers to the subgroups that constitute a larger indigenous group (i.e. the Western Shoshone, as a subgroup of the Shoshone recognized as a people constituting a subject at law in the *Dann* case).

ii. Preliminary Considerations and Applicable Law

Article 25 of the American Convention provides in part that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal..." The Inter-American Court has ruled that this guarantee "is one of the basic pillars, not only of the American Convention but also of the rule of law itself in a democratic society, within the meaning of the Convention [...]." [46]

The Court has also stated that "it is not enough for the remedies to exist formally, as they must yield positive results or responses to human rights violations, for them to be deemed effective. In other words, every person must have access to simple and prompt recourse before competent courts or judges that protect their fundamental rights.[47]" The Court also states that these remedies are illusory if there has been an unwarranted delay in rendering a judgment.[48]

To highlight the importance of this protection, the Inter-American Court indicated in its advisory opinion on judicial guarantees in states of emergency, that Article 25(1)

> establishes in broad terms the obligation of the States to provide to all persons within their jurisdiction an effective judicial remedy to violations of their fundamental rights. It provides, moreover, for the application of the guarantee recognized therein not only to the rights contained in the Convention, but also to those recognized by the Constitution or laws.[49]

The Court thus concluded that judicial guarantees are not subject to suspension of guarantees during a state of emergency.[50]

Finally, Law 555-76 of Esmeralda states that "indigenous peoples are entitled to government recognition and the lands and territories where they have settled and labored to

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[46] I/A Court HR, *Cantos Case*, Judgement of November 28, 2002, Series C No. 97, at para. 52.

[47] *Las Palmeras Case*, Judgment of December 6, 2001 at para. 58.

[48] *Id.*

[49] *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R., Ser. A No. 9, (1987) at para. 23.

[50] *Id.* at para. 38.

derive the resources necessary for their social, physical, and cultural survival."[51]

iii. The Commission's Arguments

The Commission will cite the *Awas Tingni* case in which the Inter-American Court concluded that the Nicaraguan State had violated Articles 21 and 25 with respect to the community of *Awas Tingni*

The State will argue that the government began the administrative process for recognizing the Numa in 1995 to comply with Law 555-76, and it is being carried out with full guarantees of impartiality and objectivity. The State has an orderly legal procedure for recognizing an "indigenous people," and the self-styled Numa are exercising their right to so petition in normal fashion. This is an effective process, but it is complicated.

If the Numa were an indigenous people constituted from time immemorial, with a clearly distinct culture of its own, with the typical characteristics of a differentiated culture such as a language of its own, ceremonies, histories, forms of organization, etc., proving their character as a distinct people would have been simple. However, the origin of the Numa when separating from the Lanta in contemporary times, and the nature of their prior activities in the territory to the east of the river,