ARIZMENDI *ET AL.* V. CHUQUI[1]

BENCH MEMORANDUM

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ACADEMY ON HUMAN RIGHTS AND HUMANITARIAN LAW
AMERICAN UNIVERSITY -W

It can be said generally that States are bound internationally by the obligations contained in the human rights treaties once they have expressed their voluntary consent to do so. These international obligations prescribe certain conduct, and the State's failure to adhere to such conduct gives rise to the international responsibility of the State. Therefore, in principle, the international responsibility of the State is determined by acts or omissions attributable to the State.

The special nature of human rights treaties has been established in numerous decisions issued by international bodies for the protection of human rights. Their special nature is derived from the fact that they are treaties that protect a greater good, the individual person. The Inter-American Court has stated that they are treaties inspired by common values centered on the protection of human beings.[2] Therefore,—unlike other international treaties— human rights treaties are not based on a reciprocal exchange of rights for the mutual benefit of the States; rather, they are treaties whose object and

The Court has established in principle that any infringement of human rights shall be imputable to the State if it can be attributed, according to the rules of international law, to the act or omission of any public authority, and the State thereby incurs responsibility in the terms provided by the Convention. To this effect, any time an entity or employee of the State or of a public institution unduly infringes such rights it constitutes non-compliance with the duty to respect enshrined in article 1 of the Convention.[13] It is independent of whether the government entity or employee has acted in violation of domestic law provisions or exceeded the limits of its/his own jurisdiction, given that it is a principle of international law that the State is responsible for the acts of its agents when such acts are performed under color of law, and is responsible for their omissions even if they act outside the limits of their jurisdiction or in violation of domestic law.[14]

Furthermore, to establish that there has been a violation of the rights enshrined in the Convention it is not necessary to determine (as it is in domestic criminal law) the guilt of its perpetrators or their intent; nor is it necessary to individually identify the agents to whom the violations are attributed.[15] It is sufficient to demonstrate that the authorities have supported or tolerated the infringement of rights recognized in the Convention[16], or the omissions that have allowed these violations to be perpetrated.[17]

The obligation to prevent, as well as the obligation to investigate, is an obligation of means or conduct, and "the existence of a particular violation does not, in itself, prove the failure to take preventive measures";[18] rather, it is "because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[19] The Court has held that the duty to investigate is a means to ensure the rights protected under articles 4, 5 and 7 of the Convention, and its breach gives rise to the international responsibility of the State.[20]

With regard to the general duty set forth in article 2 of the Convention, the Court has indicated that it entails the adoption of measures along two lines. On one hand, it involves the suppression of standards and practices of any kind that amount to a

[13] *Cf.* Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 72 (July. 8, 2004); Five Pensioners v. Perú, 2003 Inter-Am. Ct. H.R. (ser. C) No. 98, 63 (Feb. 28, 2003); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, 2003 Inter-Am. Ct. H.R. (ser. A) No.

violation of Convention rights. On the other, it entails the issuance of standards and the development of practices conducive to the effective observance of such rights.[21]

The resolution of this case therefore raises the issue of whether the State met these two categories of obligations. On this point, the participants will have to argue as to whether the State, by act or omission, violated the rights of the victims in the case—that is, whether there was **non-compliance with the duty to respect, prevent and ensure**, and whether the State met or failed to meet its obligation to **adopt measures to ensure effectively the fundamental rights of the persons who claim to have been affected adversely by it.**

B. State Responsibility for the actions of third parties and the duty of prevention

Can a State be internationally responsible for human rights violations committed by third parties who are not public officials, entities or employees of the State? *Is the State required to consider in the adoption of its public policies every possible circumstance that might result in a violation of some human right?*

Without prejudice to the above discussion, the Court has indicated that international responsibility can also arise from acts of private individuals that are not in principle attributable to the State. Although it is the States Parties to the Convention that have obligations *erga omnes* to respect and ensure respect for the standards of protection and to ensure the effectiveness of the rights enshrined therein under all circumstances and with regard to all people,[22] the effects of these State obligations go beyond the relationship between its agents and the individuals under its jurisdiction; they are also manifested in the positive obligation of the State to adopt the measures necessary to ensure the effective protection of human rights in relationships among individuals. The attribution of responsibility to the State for private acts may occur in cases where the State fails to comply, by the act or omission of its agents when they are in the position of guarantors [of rights], with those *erga omnes* obligations contained in articles 1.1 and 2 of the Convention.[23] Likewise, in the case of *Albán Cornejo et al.,* the Court established that State responsibility can arise from acts carried out by private individuals when the State fails to prevent or stop the acts of third parties who infringe upon legally protected interests.[24] Therefore, the Convention and the obligations prescribed therein stand on the principle of prevention and the effectiveness of the protection.[25] Similarly, in

[21] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 109 (Sept. 16, 2005), Lori Berenson Mejía v. Perú,

Advisory Opinion 18 on the *Juridical Condition and Rights of the Undocumented Migrants*, the Court stated that

> [t]he obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes)*. This obligation has been developed in legal writings, and particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.[26]

For its part, the Commission has found State responsibility in several cases where the acts of violation were committed by third parties. This occurred in the case of the mining companies operating on land belonging to the Yanomami indigenous people of Brazil,[27] in which it found the State responsible for omitting to adopt timely and effective measures to protect the human rights of the individuals affected;[28] this was also the case with regard to petroleum development activities in Ecuador[29] that contaminated, among other things, the water used by the region's inhabitants. The Commission recognized the freedom of States to exploit their natural resources, including by opening up to international investment; however, it emphasized the serious consequences of inadequate regulation at the national level resulting in human rights violations.[30]

The European Court has referred to the responsibility of the State for acts not committed by State agents within the framework established in article 1 of the European Convention, which contains the obligation of States to ensure the rights recognized therein. In the case of *A v. United Kingdom*, the Court linked article 1 to the substantive right recognized article 3 of the European Convention, and established that the State can be responsible for violating the prohibition against torture or cruel, inhuman or degrading treatment even if they were acts committed by third party nonstate actors, because of the State's failure to ensure that the law adequately protected a young man from abuse at the hands of his stepfather. The European Court held that the substantive right at issue requires the State to adopt measures designed to ensure

The State can argue that acts committed by third parties cannot be attributed to it as though they were the State's own acts, and that these acts—which are outside the realm of state activity—cannot give rise to the international responsibility of the State. Only if it is demonstrated that the corporation's conduct is imputable by act or omission to agents of the State, because they failed to comply with their convention duties in the face of acts committed by private agents (the company), could international responsibility be attributed to the State.

Compliance with the State's obligations requires the establishment of priorities that take into account the limited resources available to a State, which can become valid limitations to the enjoyment of a right when they are consistent with criteria of reasonableness and proportionality.

For the State, its action was confined to the margin that States have for the development of public policies aimed at guiding public life and the interaction of social actors and private actors. The State of Chuqui is a poor State with few resources. In spite of this, it has developed certain environmental and health laws according to which the companies that wish to establish themselves in the country must meet certain requirements in order to obtain the necessary environmental and health licenses, and the companies are required to comply fully with the standards for the protection of health and the environment. Based on the facts, it was determined that the company violated those laws, and the State immediately set in motion the mechanisms of action necessary to eliminate the risks posed by the company. Furthermore, the State complied with the recommendations of the International Monetary Fund in terms of the public policies relating to foreign corporations. With the resources that the State has, it cannot conduct technical monitoring of any great significance; rather, it is the corporations themselves that must allocate funds for environmental

D. Duty to ensure with regard to the environment: principles of sustai

enjoyment of all human rights, entails the use of natural resources. The Declaration on the Right to Development,[51] in pertinent part, defines this right as follows:

> 1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The 1992 World Conference on Human Rights recognized that the illegal dumping of toxic waste and dangerous substances could constitute a serious threat to the rights of all people to life and to health. The "Río Declaration on Environment and Development" was issued at this conference, holding that "sustainable development" is that which tends to eliminate poverty and improve quality of life (principles 5 and 8) but "[is] fulfilled so as to equitably meet developmental and environmental needs of present and future generations" (principle 3) and considers "environmental protection [as an] integral part of the development process and not […] isolate[ed] from it" (principle 4).

In this context, the United Nations Special Rapporteur investigating the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, has cited the obligation of States, in view of the rights to life and to health, to ensure those rights by adopting policies to facilitate the safe handling of hazardous materials.[52] In addition, General Comment 14 of the ESCR Committee has considered the right to a healthy environment on of the "underlying determinants of health."[53] Among the measures that States should adopt in aiming to satisfy the right to health are "the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health."[54] To ensure the enjoyment of the right to food (General Comment 12), the ESCR Committee considered essential "appropriate […] environmental […] policies."[55], including those aimed at preventing the contamination of food products.[56] With regard to the right to adequate housing, the Committee has

high levels of contaminants in the air, soil and water in the community of La Oroya (Peru) from metal particles released by the smelter plant operating there.[59]

On par with the principle of sustainability, environmental law includes the **principle of precaution or precautionary principle.** According to this criterion, "[W]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[60] Therefore, every political decision-maker must act in advance, and before possessing scientific certainty, to protect the environment and, consequently, the interests of future generations.[61]

In accordance with the obligation to "protect", it is the States' duty to create a regulatory system that requires private parties to refrain from harming the environment. The performance of this duty includes mechanisms such as Evaluations or Environmental Impact Studies. On this point, the Río Declaration on the

the Commission requested on behalf of the Mayas Indigenous Communities and their members that the State of Belize adopt the necessary measures to suspend all

The State could argue that it is difficult to measure the impact at the time of an al

to this right are inadmissible.[73] In accordance with article 27.2 of the Convention, this right forms part of the non-derogable nucleus; it is enshrined as one of those rights that cannot be suspended in times of war, public danger or other threats to the independence or security of the States Parties.[74]

As discussed above, States have the obligation to ensure the creation of the requisite conditions to prevent violations of the right to life,[75] and they also have the duty to prevent its agents from violating it.[76] The case law of the Inter-American Court has consistently held that the observance of article 4, in connection with article 1.1 of the American Convention, not only presupposes that no one shall be deprived of his life arbitrarily (negative obligation) but it also requires that States adopt all appropriate measures[77] to protect and preserve the right to life (positive obligation) [78] in accordance with its duty to ensure the full and free exercise of the rights of all persons under its jurisdiction. As such, the right to life also encompasses the right not to face conditions that impede or hinder access to a decent life or existence.[79]

In developing this analysis, the Court specified the need for States to create an appropriate framework of standards to discourage any threat to the right to life; to establish an effective justice system capable of investigating, punishing and redressing all deprivation of life caused by State agents[80] or private parties;[81] and to safeguard the right not to be prevented from having access to conditions that guarantee a dignified existence,[82]

The European Court has also ruled on the right to life and the obligations of the State. Thus, as we have seen, the State's

that a chemical manufacturing company might cause and the repercussions on its population, meaning the risk to the health and lives of those individuals.

Arguments of the Commission and the State

The Commission can argue that the State violated article 4.1 of the American Convention in connection with article 1.1 (of the Convention) in that it failed to adopt the necessary positive measures within the scope of its powers to prevent or avoid the risk to the right to life of the inhabitants of the area in which the polluting company was operating. As guarantor of the right to life of the individuals under its jurisdiction, it is reasonable to expect that the State would monitor the emissions, and it is also reasonable to require that it have knowledge of the circumstances that were occurring. The deaths are therefore attributable to the State due to its failure to prevent, which is furthermore a violation of article 19 of the Convention. Given that the company was a chemical manufacturer, the State was required to develop periodic oversight mechanisms to monitor the company's contaminating emissions. It is not sufficient for the company to meet some initial requirements for setting up operations in the country; rather, it is necessary to ensure that, during the course of its operation, it not exceed the maximum levels of contamination permitted by law, given the evident fact that such chemical activity creates a risk to the health and lives of the people residing in the area.

The State can argue that it is a disproportionate and unpredictable burden to require it to foresee every possible threat to the lives of each and every one of its citizens, especially with regard to acts not committed by agents of the State, given that the State has no control over the private activities conducted within its borders. Domestic jurisdiction is the appropriate realm in which to resolve potential threats to the lives of a State's citizens, as occurred in the case at hand. There are laws regulating the maximum allowable emissions of contaminants by chemical companies, and it is the obligation of those companies to obey the law. Once it was determined that the company was not in compliance with such regulations and had endangered the lives of citizens—and caused the death of several—the State apparatus, within the scope of domestic law, began working effectively to investigate the events, determine responsibility and punish the guilty parties. Up to that point, the State was unaware of the risk that the company's activity was causing, and this is the only reason it did not take measures sooner.

II. VIOLATIONS OF THE RIGHT TO LIFE AND THE RIGHT TO PERSONAL INTEGRITY ARISING FROM HARM TO HEALTH[95]

Relevant facts

- In December of 1999 it was reported that over 30 people had been hospitalized for severe intoxication from mercury or chemicals, which in some cases had severely and irreversibly a

- Between December of 1999 and March 30, 2001 another 14 people had been hospitalized for contamination by mercury and other chemicals, one of whom will have to undergo dialysis treatments for the rest of his life.
- On August

hemisphere, has dealt at great length with this interdependence between health conditions and the guarantee of basic social goods in detention centers and the immediate protection of the right to a decent life and the right to personal integrity.[100]

This line of interpretation has also been put forward by other bodies for the protection of human rights in the universal system. In effect, the Human Rights Committee of the United Nations (hereinafter "HRC") has indicated that "persons deprived of their liberty [...] may not be subjected to [...] any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."[101] This line of reasoning includes the basic social rights that guarantee a deprivation of liberty compatible with human dignity.

The following two cases deal with indigenous communities that brought claims before the State of Paraguay for the return of their ancestral lands, stating that they were living outside those lands in very precarious conditions. These conditions included factors such as unemployment, malnutrition, substandard housing and difficulties in accessing potable water and health services.

66. In its judgment in the case of the *Yakye Axa Indigenous Community,* the Court found that the right to life included access to conditions that enable a decent existence. Accordingly, it considered it proper to evaluate whether the State had met its positive obligations in regard to the right to life "in view of the provisions set forth in Article 4 of the [ADHR], in combination with the general duty to respect rights, embodied in Article 1(1) and with the duty of progressive development set forth in Article 26 of that same Convention, and with Articles 10 (Right to Health); 11 (Right to a Healthy Environment); 12 (Right to Food); 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Additional Protocol to the American Convention, regarding economic, social, and cultural rights, and the pertinent provisions ILO Convention No. 169."[102] Examining the facts of the case, the Court stated that the community's miserable living conditions, and the effect of those

[100] The following cases are notable among the decisions of the Inter-American Court on this issue: Miguel Castro-Castro Prison 2006, Inter-Am. Ct. H.R. (ser. C) No. 160, 285, 293-295, 300, 301 (Nov. 25, 2006); Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, 102-103 (July. 5, 2006); De la Cruz-Flores v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 115, 132 (Nov. 18, 2004); Tibi v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, 157 (Sept. 7, 2004); Loayza-Tamayo. Provisional Measures (Whereas clauses 4, 5 and 6; clause one); as well as the Provisional Measures on the Penitentiaries of Mendoza (Argentina), Febem (Brazil), Urso Branco (Brazil), Yare I and II (Venezuela) and La Pica (Venezuela). The following are notable decisions of the Inter-American Commission: Precautionary measures granted in favor of the detainees being held at the National Civilian Police substation in the municipality of Sololá on December 23, 2005 (Guatemala); Precautionary measures granted in favor of 62 children held in the Juvenile Center of Provisional Confinement on November 24, 2004 (Guatemala); Precautionary measures granted in favor of Luis Ernesto Acevedo and another 372 individuals deprived of their liberty in the National Civil Police Station in the city of Escuintla on October 24, 2003 (Guatemala); Precautionary measures granted in favor of the patients of the Neuropsychiatric Hospital on December 17, 2003 (Paraguay) and Precautionary measures granted in favor of Diego Esquina Mendoza and other persons on April 8, 1998 (Guatemala).

[101] *Cf.* Human Rights Committee, General Comment No 21. *The humane treatment of persons deprived of liberty* (para. 3). See also, Committee on Economic, Social and Cultural Rights, General Comment No. 14 *The right to the highest attainable standard of health* (para. 34); General Comment No. 15 *The right to water* (para. 16); IACHR, *Case of Oscar Elías Biscet et al.* (paras. 155-158, 264 and 265).

[102] *Cf.* Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 163 (June. 17, 2005).

subjected, such as deficient medical care, and insufficient and poor quality food, among others.[108] The Commission advanced an approach of interdependence in its examination of the violation of the right to life and to personal integrity due to the

What is the level of absence of inspection, monitoring and oversight that creates international responsibility for the violation of the rights to health and to the environment?

Applicable law

General Comment 14 of the ESCR Committee (para. 51), which addresses the right to health, states that the failure to take all necessary measures to protect persons against the violations of that right by third parties constitutes a violation of the obligation to protect. The Committee includes in this category omissions such as "the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others."

In the case of *Ximenes Lopes v. Brazil*,[111] which deals with the death of a mentally disabled person while under the care of a rest home, the Inter-American Court examined, *inter alia*, the obligation to ensure inspection, monitoring and oversight in the provision of health services. After specifying that it is possible to attribute international responsibility to a State for the actions of third parties who provide public services, the Inter-American Court emphasized that "the duty of the States to regulate and supervise the institutions which provide health care services, as a necessary measure aimed at the due protection of the life and integrity of the individuals under their jurisdiction." This duty encompasses "both public and private institutions which provide public health care services, as well as those institutions which provide only private health care."[112] (para. 141).

These considerations were reiterated in the case of *Albán Cornejo et al. v. Ecuador,*[113] a case dealing with medical malpractice. In this decision the Court held that "when related to the essential jurisdiction of the supervision and regulation of rendering the services of public interest, such as health, by private or public entities

demonstrates clearly the absence of a suitable monitoring mechanism for purposes of prevention.

The State could assert that its obligation to supervise third parties is an obligation of means and not an obligation of results. To this effect, when they learned of the serious events, the respective authorities acted and punished the appropriate parties. The State would therefore argue that the control was effective.

IV. PROGRESSIVE DEVELOPMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ARTICLE 26)[115]

Are the rights to health and to the environment justiciable based on article 26 of the American Convention?

Applicable law

In addressing ESCR, the Convention refers to the Charter of the Organization of American States (hereinafter "OAS Charter"), adopted in 1948 and amended in 1967. Article 26 states the following:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The determination of the scope of article 26 has created a number of doctrinal debates. The first of these concerns whether the American Convention establishes enforceable social rights.

Some approaches consider that the emphasis on the progressive development of these rights deprives them of justiciability, so that they would have to be understood solely as programmatic objectives. Contributing to this is an interpretation that considers that "the rights" enshrined in the OAS Charter would not be "rights in a strict sense." In effect, and as noted by Héctor Gros Espiell in his criticism of the express non-inclusion of each one of the ESCR in the American Convention, "[t]he mistake was in failing to understand that the economic, social and cultural standards of the Protocol of Buenos Aires—although they listed economic, social and cultural rights—did not have the purpose of ensuring human rights, but rather of establishing guidelines for the conduct of States on economic, social and cultural matters."[116] Judge Manuel Ventura Robles, having studied the background and preparatory work on the American Convention, considers that the ESCR "were not included" in it. For this reason, Judge Ventura indicates that the jurisprudence of the Inter-American Court has made mention of these rights as they arise from the violation of civil and

[115] This segment is based, in part, on María Aránzazu Villanueva Hermida, Agustín Enrique Martin and Oscar Parra Vera, *Protección Internacional de los Derechos Económicos, Sociales y Culturales. Sistema Universal y Sistema Interamericano*

political rights.[117] The positions maintaining that article 26 does not include social rights place emphasis on the draft presented by the Inter-American Commission before the Special Inter-American Conference of 1969 –which did not include these rights–[118] and on the understanding of the progressivity clause as a "non-justiciability standard."[119]

Other positions with respect to article 26 of the American Convention defend the thesis of the establishment of enforceable rights in said instrument. As to the debate on the historical background of the standard, we stress that three distinct positions were recorded in the minutes of the Special Inter-American Conference:[120] (a) no mention of ESCR; (b) a thorough and express listing of them; and (c) very general reference to ESCR, with reference to commitments of progressivity. It is worth noting that the Colombian delegation made an express proposal for the detailed inclusion of ESCR. This initiative was rejected and an intermediate formula of reference to the Protocol of Buenos Aires was proposed, to include the social rights that extend the OAS Charter.[121] Taking into account these acts and the preamble of the Convention, according to which the jurisdictions of the system's bodies with regard to ESCR are to be determined by that instrument,[122] it is possible to infer that upon accepting the reference enshrined in

008 27erument,

José and accepted by the States [...] are subject to the general system of supervision and decision; in other words, to the "means of protection."[125]

If we accept this starting point (that the American Convention establishes social rights), the subsequent work lies in the interpretation of article 26 to determine (i) what rights is it possible to infer in light of such reference to the OAS Charter; (ii) what is the scope of the progressive development clause; and (iii) how State obligations operate in relation to these rights.[126]

A resolution of these legal issues must take into account the interpretive criteria discussed in the first segment of this memorandum (*supra*): the "most favorable to the individual" and the consideration of human rights treaties as "living instruments" that must be interpreted in light of current conditions and the evolution of contemporary international law. Likewise, as emphasized by Héctor Faúndez, article 29(d) of the ADHR stipulates that none of its provisions may be interpreted to exclude or limit the effects of the American Declaration of the Rights and Duties of Man and other acts of the same nature.[127] It must be stressed that this declaration, as previously indicated, expressly encompasses different social rights.

Among the positions on social rights derived from article 26 are (i) interpretations that understand rights included in the standard to be only those that can be derived from the OAS Charter, without being able to use the American Declaration or the "pro individual" principle for their determination. According to this position, the "most favorable" principle of interpretation should only be used to define the scope of the respective standard.[128] On the other hand, there are (ii) positions that, through the application of the "most favorable" principle of interpretation, determine rights harmonizing the OAS Charter, the American Declaration[129] and the Protocol of San Salvador[130] as well as other international instruments on the subject (ICESCR, ILO Conventions, etc.).[131]

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[125] García Ramírez, Sergio, "Protección jurisdiccional internacional de los derechos económicos, sociales y culturales", i *Cuestiones Constitucionales*, No 9, July-December 203, p. 139; 141.

[126] The doctrinal literature has evaluated these issues exhaustively. See in particular, Melish, Tara, *La Protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos*, Quito, CDES, Yale Law School, 2003, pp. 379-392; Abramovich and Rossi, "La tutela de los derechos económicos, sociales y culturales en el artículo 26…", pp. 457-478; Faúndez Ledesma, Héctor, "Los derechos económicos, sociales y culturales en el sistema interamericano", in AA.VV, *El Sistema Interamericano de Protección de los Derechos Humanos: su jurisprudencia sobre el debido proceso, DESC, libertad personal y libertad de expresión*, San José, IIDH, 2004, pp. 98-102; 113-120; Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos", in Courtis, Christian, Hauser, Denise and Rodríguez Huerta, Gabriela (comps.), *Protección internacional de los derechos humanos. Nuevos desafíos*, Porrúa-ITAM, México, 2005, pp. 1-66.

[127] Faúndez Ledesma, Héctor, "Los derechos económicos, sociales y culturales en el sistema interamericano", p. 100.

[128] Abramovich, Víctor and Rossi, Julieta, "La tutela de los derechos económicos, sociales y culturales en el artículo 26…", pp. 470-478.

[129] Among the litigation options defended by the Center for Justice and International Law (CEJIL) is the use of the standard defined by the IACtHR in its Advisory Opinion on the American Declaration, according to which, "the American Declaration defines the rights referred to in the OAS Charter." CEJIL considers that "the rights protected by the Charter, referred to in article 26, would be those contained in the American Declaration." CEJIL, *La protección de los derechos económicos, sociales y culturales y el Sistema Interamericano*, San José, CEJIL, 2005, p. 75.

[130] Melish, Tara, "Enfoque según el artículo 26: Invocando los DESC que se derivan de la Carta de la OEA", in Idem, *La protección de los derechos económicos, sociales y culturales en el Sistema Interamericano…*, pp. 383-388.

[131] Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26…", pp. 8-29; CEJIL, *La protección de los derechos económicos, sociales y culturales…*", pp. 76-78 and

Arguments of the Commission and the State

The Commission could argue in this case that it is possible to derive the right to health and the right to the environment from an interpretation of article 26 in connection with the pertinent standards of the Protocol of San Salvador and article 29 of the American Convention. Further, it could maintain that the obligations to respect and ensure are predicated upon these rights enshrined in article 26.

The State could argue that the attribution of contentious jurisdiction to the Court must be express, and therefore cannot be derived from an interpretive exercise. To this effect, the "most favorable" principle of interpretation must be used when there are two or more interpretations, with a view to giving preference to the [guarantor], not to deriving rights without considering the principle of State consent. On the other hand, the State can stress that in the model of justiciability of the Protocol of San Salvador (which only considers the possibility of petitions regarding the right to education and some trade union rights) it is clear that the States did not give their consent for the litigation of cases relating to the right to health and the right to the environment. The numerous apprehensions that exist in this field must be distinguished from the self-monitoring of the reporting system established by the Protocol. The State could highlight the recent proposal of the IACHR regarding indicators of compliance with the Protocol. The State could also mention that the progressive development of these rights was not infringed upon; to the contrary, the operations of these companies create wealth, which will increase the opportunities for a greater number of citizens to enjoy various social rights, such as the right to work and the right to development, among others. To this effect, there is no evidence that the rights to health and to the environment are being affected with respect to the overall population, and the small number of adversely affected individuals is not necessarily representative of the general situation in the country.

V. RIGHTS OF THE CHILD

Relevant facts

- Several children died from poisoning as a result of the water contamination.

What is the scope of the duty of special protection of children?

monitoring standard, not usable in litigation. The author explains that the duty to respect is a negative and immediate obligation, and that the duty to ensure involves positive obligations that in some way depend upon the resources of the States. To the contrary, the obligation of progressive development is evaluated in light of the results attained in satisfaction of the rights of the community. Finally, this author considers that "the differentiation among "types" of obligations applied to the rights in Chapter II and Chapter III [of the ADHR], respectively—one focused on appropriate State conduct, the other on overall levels of enjoyment of rights beyond the conduct of States– is the greatest weakness of the [IACtHR] in terms of the adequate protection of socioeconomic rights." See Melish, Tara, "El litigio supranacional de los Derechos Económicos, Sociales y Culturales: avances y retrocesos en el Sistema Interamericano", p. 213 et seq.

Applicable law

The Court has held that the American Convention as well as the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural190 670.4992 T>AN0r(u)-4o.4992[(ocooa)-(of)-4S(

> [a] governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. In this respect it is relevant that the authorities have consistently monitored the situation.[156]

In the case of *Gronus v. Poland*, the European Court considered inspections and studies on contamination levels as effective measures for preventing or minimizing environmental pollution, and therefore reducing interference in the lives of citizens. In the case of *López Ostra*, these measures would also be the provision of public access to information, so as to allow individuals to make decisions regarding the risks involved and to plan their private and family lives accordingly.

In the case of *Guerra et al. v. Italy, th*e European Court established that the failure to provide public information on pollution can be a violation of the right to the private and family lives of individuals. With this the idea is for people to exercise their right to have appropriate and relevant information, and thus make decisions regarding the impact it might have on their private and family lives.

Arguments of the Commission and the State

The Commission can argue that the adverse effects on the health of individuals—especially those who suffer irreversible consequences as a result of the intoxication—simultaneously affect their right to family life. Not only must the personal life of each individual be adapted to the new circumstances the events have created with regard to that person's life plan, but the existing family life (or the plans they had for that life) are also impacted. The same is true for the families that have been disorganized by the death of one of its members, especially those in which the deceased was the breadwinner.

The State can argue that there is no direct violation of that right, that it is instead an indirect consequence of the events that took place. Further, the State is not responsible for those events and, in any case, this would be a matter to be approached from the perspective of reparations, not as a violation of any substantive right.

VII. THE RIGHT TO P

Relevant facts:

- T

  main plant resulted in mercury contamination that permeated the surface of the ground, seeped through the water table, reached other publicly and privately used properties and came into contact with people.

operty protected in article 21 of the Convention?
Can environmental protection also be framed within the scope of private property?

156 [redacted]

Can private property extend to the use and enjoyment of the subsoil? Can arguments regarding the right to collective property be used in this particular case?

Applicable law

Article 21.1 and 21.2 (Right to Private Property) of the Convention stipulate that:

> […]Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> […]No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

The Inter-American Court has established that the first paragraph of article 21 of the American Convention establishes the right to private property, and specifies use and enjoyment as an attribute of property. It includes a limitation on those attributes of property for reasons of social interest. The Court has developed in its case law a broad concept of property that encompasses, *inter alia*, the use and enjoyment of property, defined as "those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."[157] Also through Convention article 21, the Court has protected acquired rights, understood as "right[s] that ha[ve] been incorporated into the patrimony of the persons."[158]

Nevertheless, the right to property is not an absolute right; article 21(2) of the Convention states that for the deprivation of a person's property to be consistent with the right to property, it must be based on reasons of public utility or social interest, subject to payment of just compensation, and restricted to the cases and the forms established by law[159] and carried out in accordance with the Convention.[160]

The Inter-American Court has also recognized the right to communal property. In the *Mayagna* case, the Court held that "article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property."[161] Likewise, in the *Sawhoyamaxa* case the Court considered "indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land 'is not centered on an individual but rather on the group

[157] *Cf.* Palamara-Iribarne v. Chile, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, 102 (Nov. 22, 2005); Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 137 (June. 17, 2005); Moiwana Community v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, 129 (June. 15, 2005); Mayagna (Sumo) Awas Tingni Community, 2000 Inter-Am. Ct. H.R. (ser. C) No. 66, 144 (Feb. 1, 2000).
[158] *Cf.* Five Pensioners v. Peru 2003 Inter-Am. Ct. H.R. (ser. C) No. 98, 102 (Feb. 28, 2003).
[159] *Cf.* Palamara-Iribarne v. Chile, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, 108 (Nov. 22, 2005); Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 145, 148 (June. 17, 2005); Ivcher-Bronstein v. Perú, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, 128 (Feb. 6, 2001).
[160] *Cf.* Chaparro Álvarez y Lapo Íñiguez v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 170, 174 (Nov. 21, 2007).
[161] *Cf.* Mayagna (Sumo) Awas Tingni Community, 2000 Inter-Am. Ct. H.R. (ser. C) No. 66, 148 (Feb. 1, 2000).

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necessary to its proper operation, which demonstrated his care and intent not to pollute and cause harm to third parties.

- No indictments were issued against any authorities or officials from the Ministry of Health, the Ministry of the Environment or the Office of the Mayor of Kinkili, as they did not have adequate resources for effectively monitoring the pollution that the company was generating, and therefore there was no way for them to know what was happening.

Due process – Lines of investigation

Can the Court analyze lines of investigation? *Can the Court sanction a State for not convicting a specific individual?* *What are the requirements of due process?*

Applicable Law

The obligation to investigate human rights violations is within the positive measures that States must take to ensure the rights recognized in the Convention.[167] Among the obligations that arise from the relationship between articles 1.1 and 8 of the Convention is the obligation to investigate seriously, and not just as a simple formality,[168] the events that may have violated a right enshrined in the Convention. Accordingly, when State authorities have knowledge of the act, they must initiate a serious, impartial and effective investigation *ex officio* and without delay.[169] This investigation must be conducted through all available legal means and be oriented toward the determination of the truth.[170] However, the Inter-American Court has considered that the obligation to investigate is an obligation of means and not of results.

It is notable that the obligation to investigate derives not only from the conventional standards of international law that are imperative for States Parties; rather, they are also derived from domestic laws that make reference to the duty to investigate *sua sponte* certain unlawful conduct and to the standards that enable the victims or their relatives to report or file criminal complaints for purposes of participating

we start from the premise that the investigation must be initiated utilizing all means possible or available to the judge or prosecutor who investigates in order to identify the perpetrators, convict them and eventually punish them, we can ask whether the Court can determine whether certain acts within the investigation were pertinent to that objective. On this point, there have been positions expressed in the case law of the Court that might support the arguments of both the State and the Commission, as outlined below.

Arguments of the Commission and the State

The Commission can use case law to support the argument that the Court not only has jurisdiction but also that it should examine the lines of investigation to analyze whether there was any violation of articles 8 and 25 of the Convention. Specifically, in the judgment of la Rochela v. Colombia,[172]

The State, on the other hand, can argue that in the case of Nogueira de Carvalho v. Brazil,[175] the Court ruled that did not have jurisdiction to examine the relevance or favorability of the modes of investigation used by the members of the judicial branch, since its jurisdiction is limited to verifying whether the proceedings were conducted in compliance with the judicial guarantees or the judicial protection established in articles 8 and 25 of the Convention. Specifically, the Court stated that:

> *The Court emphasizes that courts of the State are expected to examine the facts and evidence submitted in particular cases. It is not the responsibility of this Court to replace the domestic jurisdiction by ordering concrete methods or forms for investigating and judging a specific case in order to obtain a better or more effective outcome; instead, its role is to find whether or not, in the steps actually taken domestically, the State's international obligations embodied in Articles 8 and 25 of the American Convention have been violated.*[176]

In the case at hand, the State can use this judgment of the Court to argue that the Court lacks jurisdiction to specify the lines of investigation that the State should have followed in order to determine who was responsible for the contamination. According to this reasoning, the Court would not be able to make any specific reference to the fact that the public servants from the Ministry of Health, the Ministry of the Environment and the Mayor's Office of Kinkili—who were in charge of monitoring and ensuring the protection of the environment and the health of the citizens—were not convicted.

However, the Commission could respond to this argument by asserting that the precedent developed in the *Nogueira de Carvalho* judgment does not apply in this case, because the main fact in that judgment, the murder of Francisco Gilson Nogueira de Carvalho, took place before the State recognized the contentious jurisdiction of the Court. In this case, all of the events took place after the State of Chuqui had already ratified the Convention

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who were identified later."[187] Clearly, the Court did not establish a specific type of

[187] *Cf.*

living conditions of the victim[s]."[195] Within the category of non-pecuniary damages, the Court has recognized—although not always explicitly—pain and suffering, harm to a person's life plan, and psychological, physical and collective damages.[196]

Arguments of the Commission and the State

Based on the above considerations, the Commission could argue that the chemical spills (mercury) have caused the following types of damages: a) pecuniary, as a result of the contaminants that reached different publicly and privately used properties, which could based on consequential damages, lost wages and damage to family property; b) physical, based on the adverse health effects and the deaths of some people; c) collective damages, based on the risk posed to society, specifically the approximately 150,000 individuals in the contaminated area; d) environmental damages, based on the contamination of the ground surface (groundwater tables), in connection with the right to life and the right to a healthy environment.

The Commission must further prove that such damages have a causal connection or nexus to the violations alleged. It could argue that although the State did not cause those damages, it was negligent in its failure to exercise effectively its duty of prevention, which gave rise to its international responsibility as alleged in previous chapters.

The State could argue that it is not responsible for the alleged damages caused. In contrast to human rights violations under the Convention, the State did not act any time, with any intention, malice or premeditation to cause the damages. To the contrary, within the framework of its jurisdiction, the State acted preventively to mitigate the damages by shutting down the company and ordering the clean-up of the contaminants. In addition, the damages alleged by the Commission do not follow clearly from the theory of damages, and

should therefore hear the case and ensure that compensation is awarded for the pecuniary and non-pecuniary damages, and that the measures of satisfaction and non-repetition it considers necessary are granted.

The State can maintain the position that the act is not directly imputable to it, and that there was no negligence, malice or generalized practice on its part. As stated in the arguments relating to the responsibility of the State in this case, if it is concluded that the act is not imputable to the State, it should not be responsible for acts committed by third parties. Moreover, it is impossible to prove that the State acted without diligence or that there was some type of intent that would involve it directly in the facts of the case.

b) Sufficiency of the reparations and subsidiarity of the human rights system to the national system

The Commission can further argue that the State was not the party that compensated the victims directly, and that the reparations made were insufficient because they failed to meet the standards established by the Court. Likewise, it would not be the first time the Court heard a case in which the victims had already been partially compensated, and there is no standard in the Convention or its Regulations that would clearly prevent the Court from exercising its duties in such a case.

The Commission can use the following case law to support its hypothesis. Indeed, in the judgments in the cases of the Massacres of

stated that it will consider the results obtained in administrative proceedings when it establishes the respective reparations, "insofar as the outcome of those proceedings has generated *res judicata* and is reasonable under the circumstances of the case."[202]

While Androwita S.A. was ordered in a civil case to pay US$ 5000 (five thousand dollars) to each family member of the deceased victims and US$ 2000 (two thousand

This is related to the idea of enforcing the principle of legal security in the international system and also to provide an opportunity for the State to find an internal solution, given that the State should be able to "resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction."[204]

In this case, the State can argue that, according to the above, this case should not be heard by the Court because the State acted diligently within its own jurisdiction to

Arguments of the Commission and the State

measures?

Applicable law

At this point, the participants are expected to identify the possible reparations that the Commission might request in case the State is found guilty, taking into account the type of damages, the causal connection and the type of measure that would truly redress the harm caused. The State can put forth arguments against the reparations measures requested by the Commission, following the previously described logic, and at the same time reiterating the reasons for which no type of reparations should be awarded.

Thus, as previously mentioned, it is a principle of international law that every violation of an international obligation which results in harm creates a duty to make adequate reparation.[208] To this end, the Court should order different specific measures to redress the harm caused. The Inter-American Court has reiterated that the reparation established must bear relation to the violation found.[209]

The Court has held that "[r]eparations is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees of non-repetitions among others.)"[210]

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law establish (Principle 19) that adequate reparation may include measures such as: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[211] Likewise, the Inter-American Court

[208] *Cf.* Velásquez-Rodríguez v. Honduras, 1990 Inter-Am. Ct. H.R. (ser. C) No. 9, 25 (Aug. 17, 1990).
[209] *Cf.* Garrido-Baigorria v. Argentina, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, 43 (Aug. 27, 1998).
[210] *Cf.* Case of Loayza-Tamayo v. Peru, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, 85 y 151 (Nov. 27,

has ordered additional measures to act under domestic law,[212] as well as obligations regarding the duty to investigate and punish,[213] and the payment of costs and expenses.

Finally, with regard to responsibility of international corporations, Norm 18 of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*[214] *(hereinafter Norms on the responsibilities of corporations with regard to human rights),* establishes that:

> "Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, *inter alia,* reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law."

pollution; ii) that the State amend its laws so that corporations that invest in its country meet the standards of the Convention in relation to the Norms on the responsibilities of corporations with regard to human rights.

e) *Guarantee of non-repetition:* i) training of government employees; ii)