ORDER OF THE PRESIDENT OF THE

INTER-AMERICAN COURT OF HUMAN RIGHTS

OF JANUARY 20, 2012

CASE OF THE KICHWA INDIGENOUS PEOPLE
OF SARAYAKU *v.* ECUADOR

HAVING SEEN:

1. The application brief presented by the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") against the Republic of Ecuador (hereinafter "the State" or "Ecuador") on April 26, 2010, and its annexes received on May 17 that year.

2. The brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief") presented by the representatives of the alleged victims[1] (hereinafter "the representatives") on September 10, 2010, and its annexes received on September 29 and October 7 and 22, 2011.

3. The brief filing a preliminary objection, answering the application, and with observations on the pleadings and motions brief, presented by the State of Ecuador (hereinafter "the State" or "Ecuador") on March 12, 2011, and its annexes received on April 4, 2011.

4. The order of the President of the Court (hereinafter "the President") of June 17, 2011, in which he convened a public hearing and required specific testimonial and expert evidence.

5. The public hearing on a preliminary objection and eventual merits and reparations held on July 6 and 7, 2011, at the seat of the Court.[2] During the hearing, the State asked the Court

[1] The alleged victims in this case appointed the following lawyers as their representatives: Mario Melo, Sarayaku lawyer, and Viviana Kristicevic, Ariela Peralta, Alejandra Vicente, Tara Melish and Francisco Quintana, of the Center for Justice and International Law (CEJIL).

[2] There appeared: for the Inter-American Commission: Luz Patricia Mejía, Commissioner, and Karla I. Quintana Osuna, adviser; for the representatives of the alleged victims: José María Gualinga Montalvo and Mario Melo, and Viviana Kristicevic and Gisela de León of CEJIL; and for the State del Ecuador: Erick Roberts Garcés, Agent, Alonso Fonseca Garcés, Deputy Agent, Dolores Miño Buitrón, María del Cisne Ojeda and Colonel Rodrigo Braganza, advisers. The following members of the Kichwa Indigenous People of Sarayaku were also present: Eriberto Benedicto Gualinga

to "require an expert appraisal" concerning the removal of explosive materials from the Sarayaku territory and invited the Court to make a "field visit" to the Río Bobonaza Communities, which include the Kichwa People of Sarayaku.

6. The brief of July 18, 2011, in which the representatives contested the said request to require an expert appraisal made by the State during the hearing.

7. The brief of August 5, 2011, and its annexes, in which the State forwarded its final written arguments.

8. The brief of August 8, 2011 and its annexes, in which the representatives presented their final written arguments.

9. The brief of August 8, 2011, in which the Commission forwarded its final written observations.

10. The note of August 19, 2011, in which the Secretariat indicated that it had taken note of the State's request that the Court "make a field visit to the Río Bobonaza Communities so that it can observe *in situ* the legal and socio-environmental complexity of the case that is being litigated," and the reiteration, during the public hearing, of the request it had made for the Court to "appoint an international expert to evaluate and propose a technical and methodological solution to the matter of the pentolite on the land of the Sarayaku Indigenous People." In addition, on the instructions of the President, the Secretariat advised "that such requests w[ould] be duly submitted to the consideration of the plenum of the Court."

11. The brief of August 24, 2011, in which the Commission indicated, with regard to the State's invitation for the Court to make a field visit to the Río Bobonaza Communities, that "the Court was empowered to take a decision in relation to this invitation; therefore, [it had] no observations to make in this regard."

12. The brief of September 1, 2011, in which the State "again asked the Court to make a field visit to the Río Bobonaza Communities".

13. The communication of September 28, 2011, in which the Minister for Foreign Affairs, Trade and Integration of Ecuador forwarded a letter dated September 20, 2011, signed by the Constitutional President of Ecuador, Rafael Correa Delgado, and addressed to the President of the Court "to ratify and formalize the invitation issued by the State's agents during the hearing held in San José, Costa Rica, on July 6 and 7, 2011, [for] the Inter-American Court make an official visit [to his country]."

14. The note of October 11, 2011, in which the Secretariat advised that the Court had ordered that "the said communications be forwarded to the representatives and the Commission, indicating that, if they had any observations or comments to make concerning that aspect of the communication signed by the President of the Republic of Ecuador, they should forward them by October 18, 2011, at the latest."

15. The brief of October 18, 2011, in which the representatives forwarded their observations on the said invitation.

Montalvo, Franco Tulio Viteri Gualinga, Hernán Malaver, Jorge Malaver, Sandra Gualinga, Bolivar Luis Dahua Imunda, Sabine Bouchat, Catalina Santi Gualinga, Carlos Wilfrido Carrasco Castro, Clever Fransisco Sando Mitiap, Carlos Santiago Mazabanda Calles and Cristina Corina Gualinga Cuji.

16. The brief of October 20, 2011, in which the Commission presented its observations on the said invitation.

17. The note of October 21, 2011, in which the Secretariat advised that, on the instructions of the President, the State, the representatives and the Commission were granted until October 27, 2011, to "submit their comments on the observations made by the parties to date in relation to the said invitation."

18. The brief of October 26, 2011, in which the Commission indicated that it reiterated its observations (*supra* para. 16).

19. The brief of October 26, 2011, in which the State presented its observations on the comments of the Commission and the representatives concerning the said invitation.

20. The brief of October 27, 2011, in which the representatives forwarded their observations on the State's remarks concerning the said invitation.

21. The note of November 8, 2011, in which the Secretariat advised that "the President of the Court had been informed" of the said briefs and that the plenum of the Court would be informed of them during its regular session.

CONSIDERING THAT:

1. The offer and admission of evidence are aspects that are regulated, *inter alia*, by Articles 35(1), 40(2), 41(1), 46, 50 and 57 to 60 of the Court's Rules of Procedure.

a) Request to appoint an expert

2. The State asked the Court to appoint an international expert "to evaluate and propose a technical and methodological solution to the matter of the pentolite on the territory of the Sarayaku Indigenous People" (*supra* having seen paragraphs 5 and 10).

3. In this regard, the representatives stated that "there was no justification or need for the Court to appoint an expert at this stage of the proceedings, because, the extensive information and evidence in the case file and in the file on the provisional measures procedure, as well as the arguments that the parties have been able to submit throughout the proceedings, are [...] sufficient to allow the Court to take a decision in this regard. In addition, they argued that the State's requests were intended to re-open the procedural stage of the presentation of evidence and arguments, which had concluded and the re-opening of which was not justified by supervening facts or evidence. Lastly, they added that these requests "could be measures that the State might consider during compliance with the reparations ordered by the Court."

4. In this regard, the Commission indicated that the deposit or storage of dangerous materials on indigenous lands is one of the situations in which prior, free and informed consent is required, so that the withdrawal of the explosives must be carried out after a consultation has been carried out to obtain the consent of the Sarayaku People. In addition, it considered that, besides the technical information provided to the Court concerning the removal of the explosives, the State's specific request "should take into account the opinion of the People," and, if they agree, "it would also be important to consult them and provide them with information on the specific measures that will be taken."

5. In its observations, the State reiterated its request that the Court appoint an expert to determine the appropriate mechanism to neutralize or to remove any explosive materials that might be in the area. It also indicated that this request "could not in any way constitute supervening evidence, because the objective of the expert appraisal would not be to submit new legal and factual arguments, but rather to establish an effective mechanism to comply with this international obligation in a way that satisfied both the Court and also the representatives and alleged victims." It also mentioned that "the appointment of the expert would help the State to implement more satisfactorily the obligations that could eventually arise for the State from the reparations that the Court orders in a judgment, as well as those that already exist owing to the provisional measures."

6. The President, in consultation with the members of the Court, considers that, during the litigation of this case, the parties have provided sufficient information in this regard, including expert appraisals, so that, at the actual procedural stage, it is not essential to order the said expert appraisal in order to decide on the merits.

b) Invitation to visit Ecuador

7. During the public hearing and on other occasions, the State asked, through the President of the Republic, the Minister for Foreign Affairs and its agents for this case that the Court make a "field visit to the Río Bobonaza Communities so that it can observe *in situ* the legal and socio-environmental complexity of the case that is being litigated" (*supra* having seen paragraphs 5, 10, 12 and 13).

8. The representatives asked the Court to reject the invitation extended by the President of the Republic of Ecuador, arguing an "evident absence of justification for the evidence that it is sought to provide in a time-barred manner." They also indicated that, with the information that is already in the case file, "the Court has all the necessary and sufficient elements to be able to decide on merits, reparations and costs in this case." In this regard, they asked the Court "to reject any procedure that attempts to delay even further the deciding of this case." In their brief of October 27, 2011, they emphasized the "unnecessary and unjustified [nature] of the State's requests," because their purpose is to re-open the procedural stage of the presentation of evidence and arguments, which has concluded and the re-opening of which is not justified by supervening facts or evidence. Lastly, they added that the State's requests "could be measures that the State might consider during compliance with the reparations ordered by the Court."

9. The Inter-American Commission indicated that it recognized that the Court is empowered to receive relevant information and evidence in the cases submitted to its consideration. Nevertheless, it observed that "it would appear that the invitation extended by the State in this case exceeds the scope of the case, because it tries to include the different communities of the Bobonaza territory." The Commission cited a precedent of a probative measure conducted by this Court, and another precedent of the International Court of Justice. In addition, it indicated that "if the Court should decide to accept the State's invitation, [...] the visit should be limited to the Sarayaku territory" and should be carried out in keeping with international practice; it therefore asked "to be present during the visit and have the opportunity to give an opinion on the evidence collected."

10. The State indicated that it rejected the representatives' argument that this was time-barred or supervening evidence or an effort to influence the ruling that the Court must make, and considered that it was for the Court to take the corresponding decision, taking into account that "the Commission [had] indicated in its brief with observations that there was no legal obstacle to the visit, and that there was already a precedent in the practice of the Court. Moreover, the [Commission] has even indicated its wish to participate in the visit through its

delegates, if it takes place." The State repeated "its request for a technical visit by the Inter-American Court in the context of this case, since it is legally feasible, [...] with the presence of a delegation from the Inter-American Commission, and [coordinating] this visit with the representatives in this case, in order to ensure transparency in all the procedures, revealing the good faith of the State, demonstrated by the high level of commitment of its authorities."

11. Regarding the request for a visit presented by the State, the Court recalls that, as established in Article 58 of its Rules of Procedure, at any stage of the proceedings the Court is empowered take the measures it deems pertinent to help it decide the case *pendente lite*. Its powers include the possibility of ordering, *inter alia*, the execution of any probative or investigative measure away from the seat of the Court. Article 58 of the Rules of Procedure stipulate that:

> The Court may, at any stage of the proceedings:
>
> a. Obtain, on its own motion, any evidence it considers helpful and necessary. In particular, it may hear any person whose statement, testimony, or opinion it deems relevant as an alleged victim, witness, expert witness, or in any other capacity,
>
> [...]
>
> d. Commission one or more of its members to take measures to advance the proceedings, including hearings at the seat of the Court or at a different location.
>
> [...]

12. Precedents exist in which a representative of the Court has executed a probative measure in the defendant State,[3] and also in which members of the Court have received the testimony of an alleged victim in a third State.[4] In addition, testimony has been received from witnesses in a prison in the defendant State;[5] experts have been appointed to perform the exhumation of the remains of an alleged victim at the site of the facts,[6] and to obtain the testimony of someone who, owing to her poor health, could not travel to the seat of the Court.[7]

13. There are also precedents in international law in which the international courts have carried out missions or field visits. For example, the International Court of Justice has visited the site of alleged facts (a dam in the State of Hungary) in the context of litigation.[8] For its part, the European Court of Human Rights has carried out fact-finding missions, under the provisions of the European Convention[9] and its Rules of Court.[10] In particular, the European

---

[3] *Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and costs.* Judgment of September 10, 1993. Series C No. 15, para. 40.

[4] *Cf. Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 44.

[5] *Cf. Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, paras. 15 and 16.

[6] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment of February 4, 2000. Series C No. 67, para. 27.

[7] Thus, for example, in the *Case of Caballero Delgado and Santana v. Colombia*, in an Order of the President of the Court of July 18, 1994, it was decided "to appoint professor Bernardo Gaitán Mahecha as a Court expert to carry out the questioning, on Colombian territory, of Rosa Delia Valderrama who, according to the Commission, [was] unable to travel to San José, Costa Rica, owing to the delicate situation of her health. The Secretariat of the Court must provide him with all necessary information to enable him to carry out this procedure." In addition, it was established that the said testimony should be given in the presence of the State's Agent for this case, and also of the Commission's delegate. *Cf. Case of Caballero Delgado and Santana v. Colombia. Preliminary objections*. Judgment of January 21, 1994. Series C No. 17, para. 16.

[8] *Cf. International Court of Justice. Case Gabcikovo-Nagymaros Project (Hungary/Slovakia), Order of 5 February 1997, I.C.J. Reports 1997, p. 3*.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms, article 38.

Court executes this type of measure, *inter alia*: (i) to collect testimony from witnesses, senior State authorities, representatives of international missions, members of non-governmental organizations, and diplomatic personnel ("fact-finding hearings");[11] or (ii) to conduct "on-the-spot investigations," which can be, *inter alia*, visits to detention centers,[12] visits to gather documentation and obtain information on the situation in the field,[13] or visits to determine the occurrence of facts alleged by the parties.[14] The International Criminal Court and the International Criminal Tribunal for the former Yugoslavia have also carried out fact-finding missions.

14. During the public hearing held in this case, one of the alleged victims, Ena Santi requested the presence of the Court in Sarayaku, stating in her testimony:

> "The State says that it has provided projects to benefit Sarayaku. The State did provide some projects [...] but it did not fulfill its commitments... you are invited to Sarayaku to verify the situation of the projects that the State has provided" (Minute 49.05 – 49.25 of the recording). "Honorable Judges of the Inter-American Court, I am inviting you to come to Sarayaku to verify the Government's projects *in situ*, to see whether there is a beautiful air strip made by the State, whether there are bridges that have been completed, and all the infrastructure they say they have given to the Sarayaku People; come to Sarayaku; we will be waiting for you [...]" (Minute 55.00 - 55.22 of the recording).

15. Although the State requested a visit to "the Río Bobonaza Communities," the case submitted to the consideration of the Court refers to facts that are alleged to have occurred in Sarayaku territory and the surrounding areas. Given the nature of the purpose of the litigation, the Court finds it useful to carry out, on a special and exceptional basis, in application of Article 58(a) and 58(b) of its Rules of Procedure and to complement the body of evidence, measures designed to obtain additional information on the situation of the alleged victims and the places where some of the alleged facts have taken place, by means of a visit to the territory of the Kichwa People of Sarayaku in Ecuador by a delegation from the Court composed of its President, its Secretary and two members of the Secretariat staff.

16. In keeping with the adversarial principle and in order to maintain the procedural balance, the visit will be carried out with the participation of representatives of the alleged victims, the Inter-American Commission, and the State, if they consider it necessary.

17. The on-site procedures will be carried out in the places on the territory of the Kichwa People of Sarayaku where it is alleged that the facts included in the factual framework of the case took place, provided that safe access can be guaranteed and the planned timetable is respected.

18. Regarding the way in which this procedure will be carried out, the State must adopt the necessary measures to:

---

[10] Rules of the European Court of Human Rights, Addendum to the Rules of Court, Rule 1A.

[11] *Cf.* E.C.H.R., *Tekin Yildiz v. Turkey*, Application No. 22913/04, Judgment of November 10, 2005; Adali *v. Turkey*, Application No. 38187/97, Judgment of March 31, 2005; *Sufi Elmi v. the United Kingdom*, Applications Nos. 8319/07 and 11449/07, Judgment of June 25, 2011; *Davydov and Others v. Ukraine*, Applications Nos. 17674/02 and 39081/02, Judgment of July 1, 2010, and *N. v. Finland*, Application No. 38885/02, Judgment of July 26, 2005.

[12] *Cf.* E.C.H.R., *Nazarenko v. Ukraine*, Application No. 39483/98, Judgment of April 29, 2003; *Cenbauer v. Croatia*, Application *73786/01*, Judgment of March 9, 2006, and *Benzan v. Croatia*, Application No. 62912/00, Judgment of November 8, 2002.

[13] *Cf.* E.C.H.R., *Tekdağ v. Turkey, Application No. 27699/95,* Judgment of January 15, 2004*, and Sufi Elmi v. the United Kingdom, Applications Nos. 8319/07 and 11449/07,* Judgment of June 25, 2011.

[14] *Cf.* E.C.H.R., *Davydov and Others v. Ukraine,* Applications Nos. 17674/02 and 39081/02, Judgment of July 1, 2010, and *Osmanoğlu v. Turkey,* Application No. 48804/99, Judgment of January 24, 2008.

a) Make, in coordination with the Secretariat of the Court, the administrative and logistic preparations to arrange travel and accommodation and to cover the pertinent expenses to allow the Court's delegation to carry out the procedure.

b) Coordinate the execution of the procedure with the representatives of the alleged victims and the Inter-American Commission.

c) Guarantee unrestricted access to the territory and to the areas decided by the Court, which includes the necessary freedom of movement and the appropriate security measures for all the delegations and those who will participate.

d) Coordinate and grant the necessary facilities for holding a preparatory meeting on the procedure in Quito.

e) Provide the necessary logistic and technological means for the live transmission and audio and video recording of the procedure.

19. During the on-site procedures and following authorization by the President, the Court's delegation may receive documentation or statements by the parties or any other person that it considers relevant or pertinent. In this case, the State must adopt the necessary measures to facilitate the reception of the pertinent documentation or statement.

20. The pertinent parts of the provisions regarding hearings in the Rules of Procedure shall be applicable to the visit. In any case, the President shall take the corresponding decisions.

21. Lastly, since the State itself asked that this visit be made, it will cover all the expenses required to ensure that the Court's delegation can execute the probative procedure satisfactorily, in accordance with Article 60 of the Rules of Procedure.

THEREFORE:

THE PRESIDENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

pursuant to Articles 4, 15(1), 26(1), 26(2), 31(2), 53, 55, 58 and 60 of the Court's Rules of Procedure, and in consultation with the other members of the Court,

DECIDES:

1. To commission the President, the Secretary and two members of the Secretariat staff to visit the territory of the Kichwa People of Sarayaku, on April 21, 2012, in the terms of considering paragraphs 15 to 21 of this order.

2. To reject the State's request that an expert appraisal be conducted.

3. To request the Secretariat of the Court, in consultation with the State, the representatives and the Commission, to coordinate the logistic and operational details of the probative procedures required in this order.

4. To require the Secretariat of the Court to notify this order to the State, the representatives of the alleged victims and the Inter-American Commission.

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

So ordered

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary