BENCH MEMO

ENGLISH

CONFIDENTIAL

NUMBER

2016 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

Case of Edmundo Camana et al.,
Pichicha and Orífuna Peoples v. Santa Clara

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Washington, 2016

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Introduction

The hypothetical case in the 2016 Inter-American Human Rights Moot Court Competition seeks to encourage debate about human rights violations stemming from the acts of extractive companies that benefit from the decisions and policies of their home countries. The case also addresses the jurisdiction of the bodies of the Inter-American Human Rights System (IAHRS) to rule on the extraterritorial responsibility of the home countries of extractive companies, the duty of those countries to provide effective judicial remedies; the right to water; and the right of indigenous and Afro-descendant peoples to consultation and to free, prior, and informed consent.

In recent decades, the supranational human rights bodies have developed standards on the attribution of responsibility to States for the acts of private parties. Although most of those standards are related to violations committed by individuals organized under State structure (e.g. paramilitary groups), there have been recent developments regarding the conduct of other categories of private parties, including corporations that benefit from State acts or omissions. In the absence of an international treaty governing the violations committed by corporations, the supranational human rights bodies – especially within the United Nations – have been the ones to interpret the instruments currently in force as they apply to the obligations of corporations' home States. The 2016 hypothetical seeks to address part of the debate concerning the scope of international human rights obligations in cases of violations committed by a transnational corporation in a developing country where impunity is the norm, and when access to the justice system of the corporation's home country is limited.

The authors of the hypothetical case are aware of the challenges the competition's participants will face in debating an issue that is still nascent in international law. Nevertheless, we are confident that the academy is a privileged forum for the discussion of legal solutions to social phenomena that affect the lives of so many people – including the social conflicts and serious human rights violations that have taken place in Latin America as a result of the large-scale extraction of natural resources. There are an enormous number of examples of extractive projects carried out to the detriment of the territory of indigenous and Afro-descendant peoples, and with disregard for the humane treatment of social leaders and defenders of the environment. Unfortunately, while extractive companies have extensive dispute resolution mechanisms protected by free trade and investment treaties, the victims of the human rights violations caused by their activities still have limited access to justice, both domestically and internationally.

As former participants in the Inter-American Human Rights Moot Court Competition, we are honored to be able to contribute to its 21st year. We hope that the participants will deepen their knowledge of the Inter-American System and be inspired to embrace human rights as professionals and as individuals, cultivating a special awareness of this cause.

I. Issues of Jurisdiction and Admissibility

One of the most important aspects of the case has to do with the jurisdiction of the Inter-American Court of Human Rights (Inter-American Court) to hear and decide matters concerning violations that take place outside the territory of the Republic of Madruga, but the responsibility for which is attributable to Santa Clara. There are at least two events that, although they took place within the borders of Madruga, were preceded by acts and omissions of the State of Santa Clara. The first is the December 12, 1994 murder of four members of the Camana Osorio family. The second is the murder of Lucía Camana Osorio in December 10, 2002. The facts of the case are inconclusive with respect to the direct perpetrators and masterminds of the murders, but there are several pieces of evidence pointing to the participation of the unlawful armed group known as "Los Tiburones." That group's criminal activities in northern Madruga have benefitted mining companies from Santa Clara. According to the facts of the case, the formation of those unlawful armed groups—known as militias—in northern Madruga can be traced back to policies and decisions of the authorities of the State of Santa Clara in the first half of the 20th century.

The representatives of the alleged victims should argue that the Inter-American Court has jurisdiction to hear and decide the allegations concerning Santa C

The Inter-American Court has declined to examine its temporal jurisdiction when the defendant State expressly acknowledges responsibility for acts occurring prior to its acceptance of the contentious jurisdiction of the Court.[2] With regard to personal, territorial, and subject matter jurisdiction, which will be explained in the following paragraphs, the Inter-American Court has performed a sua sponte analysis separate from the defendant State's assertion of any preliminary objections.

In order for the Inter-American Court to hear and decide a petition filed under Article 44 of the ACHR[3] the alleged victims must be individual persons (jurisdiction ratione personae) and the facts alleged must be related to obligations derived from a treaty ratified by the defendant State (jurisdiction ratione materiae). In addition, the events in question must have taken place subsequent to acceptance of the contentious jurisdiction of the Inter-American Court (jurisdiction ratione temporis). Finally, the petition must allege violations that took place within the territory of a State Party (jurisdiction ratione loci).[4] This general rule on territorial jurisdiction or ratione loci provides for some exceptions that allow the supranational human rights bodies to hear and decide matters occurring within the territory of a country other than the defendant State, but whose commission is attributed to its acts or omissions.

According to the facts of the case, Santa Clara raised the preliminary objection of lack of territorial jurisdiction before the Inter-American Commission on Human Rights (IACHR) in its admissibility report. It is expected that the teams representing the State will raise the preliminary objection of the Inter-American Court's lack of territorial jurisdiction, both in their written briefs and at oral argument.

Before delving into the arguments related to territorial jurisdiction, it is important to note that the analysis of the preliminary objection has certain nuances that distinguish it from the analysis of the merits regarding the attribution of responsibility to Santa Clara. Even if the Inter-American Court concludes that it has territorial jurisdiction to hear the matter, it does not automatically lead to the international responsibility of Santa Clara. In this regard, the debate on territorial jurisdiction must be complemented by a subsequent explanation of the criteria for the attribution of international responsibility to Santa Clara for the murders of December 12, 1994 and December 10, 2002.

I.2 Territorial jurisdiction or *ratione loci*

One of the IAHRS precedents that addresses territorial jurisdiction in more detail is Report on Admissibility No. 112/10, published by the IACHR in October 2010. This is a State petition,

2 See, e.g., I/ m7(.g1(c)-3(a)67GC5 0 9.r0 9.(o)- He)-3A3(y)-2(N)2(o)1()3(/)p 112/e2(o1(l)23(o)44(c)13(e)-3(c)21t)3(o)act

> enjoyment of Covenant rights is not limited to citizens of State parties but must also be available to all individuals, regardless of nationality or statelessness [...] This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace enforcement operation.[9]

It is important to stress that Article 2.1 of the ICCPR[10] worded more restrictively than its counterpart, Article 1.1 of the ACHR, in reference to the territorial scope of the obligation to respect and guarantee human rights. Nevertheless, the UN Human Rights Committee has an interpretation that is very similar to that of the IAHRS bodies. Both systems consider that territorial jurisdiction is not limited to the territory of the defendant State, and that it encompasses violations committed by means of territorial control or the exercise of authority over the victims of the violations.

The European Court of Human Rights (ECHR) has held that the term "jurisdiction" should not be confused with "territory," as it also extends to acts that have effects outside the territory of the defendant State.[11] In the case of Loizidou v. Turkey, the ECHR found that the defendant State exercised jurisdiction in those territories over which it exercised effective control by means of a military occupation:

> In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. […] the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory […].
>
> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[12]

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9 UN Committee for Human Rights, General Comments No. 31, 80th Period of Sessions, U.N. Doc. HRI/GEN/1/Rev.7, 225 (2004), para. 10.

10 This Article establishes that "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

11 ECHR. Drozd and Janousek v. France and Spain, Judgment of 26 June 1992, para. 91. See also the decisions of the European Commission on Human Rights on the admissibility of petitions 1611/62, X v. Federal Republic of Germany, 25 September 1965; Petition 6231/73, Hess v. United Kingdom, 28 May 1975; Petitions 6780/74 & 6950/75, Cyprus v. Turkey, 26 May 1975; Petitions 7289/75 & 7349/76, X and Y v. Switzerland, 14 July 1977; Petition 9348/81, W. v. United Kingdom, 28 February 1983.

12 TEDH. Loizidou v. Turkey, Judgment of 23 March 1995, para. 62.

In the case of Bankovic and Others v. Belgium, and Others, the ECHR reiterated that, under international law, the meaning of "jurisdiction" is not exclusively territorial.[13] This precedent is significant, insofar as it limits the scope of the ECHR's jurisdiction over acts that result in the violation of international obligations, but in a geographic area in which the European Convention on Human Rights was not applicable and where there was not effective control by the States subject to international complaints. Bankovic and Others concerns the death of Ksenija Bankovic and other individuals during a bombing raid in the city of Belgrade, in the former Yugoslavia, by the North Atlantic Treaty Organization (NATO). The petitioners alleged the international responsibility of Belgium and 16 other European NATO member countries. The ECHR declared the case inadmissible on the grounds that this type of military operation did not constitute effective control over the territory in question.[14] Along these lines, it concluded that it lacked jurisdiction over an aerial bombing in the territory of a country that is not part of the European Human Rights System.

There are at least two paragraphs in the Bankovic judgment whose rationale could support the arguments of the teams. The first has to do with the general rule on the exercise of extraterritorial jurisdiction by a State Party to the European Convention:

> In sum, the case-law of the Court demonstrates that its recognition of the exercise of extraterritorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[15]

The second paragraph is related to the conduct of a State's diplomatic representatives that contributes to the violation of human rights in the territory of a third country. That paragraph may be useful above all to the representatives of the alleged victims, upon substantiating the connection between the murder of the members of the Camana Osorio family and the meetings held by the Deputy Military Attaché to Santa Clara's Embassy in Madruga, Mr. David Nelson, with members of the Los Olivos militia, the alleged perpetrators of those murders. The paragraph from the Bankovic judgment that relates to this allegation is the following:

> Additionally, the Court notes that other rer3Eoryona-4(l)-1(l)agraphCrH3(osovr)3(H3nt)2(s)5

it to have been proven that Turkey had exercised effective control over a portion of the territory of Cyprus. Although the execution of the victims in this case had not occurred during a Turkish military operation, the ECHR concluded that the effective occupation of part of the territory of Cyprus had contributed to the violation of various provisions of the Convention. Unlike in the case of Bankovic and Others, both Cyprus, as the State in which the victims were geographically

proceedings before the IACHR. If it is not done at that time, the State is presumed to have waived its defense argument, and is precluded from raising it at the later stages of the proceedings before the Inter-American Court.[22]

According to Section V of the facts of the case, Santa Clara did not raise the preliminary objection of failure to exhaust domestic remedies before the IACHR. Nevertheless, there is at least one fact

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II.1.1 International standards on extraterritorial responsibility for violations derived from the acts of private corporations[23]

To date, the most tangible outcome of the discussions in governmental forums on corporations and human rights is the Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011. In June 2014, a second working group was created within the Council, the outcome of which is yet to be seen. Its mandate is to draft a binding treaty on "human rights and transnational corporations and other business enterprises".[24] In spite of these recent developments in UN political bodies, it is its thematic rapporteurships and human rights treaty bodies that have contributed more to the debate on corporations and human rights. One of the most important aspects of that debate is the extraterritorial liability of the home States of corporations that commit violations, whether directly or through corporate policies that acquiesce in the violations committed by their subsidiaries in third countries.

As a general rule, the provisions of the Inter-American instruments regulating the obligations to respect and guarantee human rights are worded similarly to those of other regional systems and the universal system.[25] Like the UN's Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man does not contain a general clause on the obligation to respect

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In the constitutional sphere, the doctrine of the Drittwirkung der Grundrechte came to support the duty to protect and guarantee fundamental rights, not only in relationships between States and individuals, but also among private parties. Developed in the late 1950s by the German Federal Constitutional Court, the doctrine would influence the judicial branches of various States founded on the constitutional rule of law. In the international sphere, while the European Court of Human Rights (ECHR) tacitly began to assimilate the doctrine of the Drittwirkung in the 1980s,[27] other supranational bodies would use a very similar rationale decades later.[28]

In the IAHRS, the Inter-American Commission on Human Rights (IACHR) has recognized that the duty to investigate human rights violations by private parties arises from both the American Convention[29] and the American Declaration.[30] The erga omnes nature of the obligations to protect and guarantee human rights has been reflected in the case law of the Inter-American Court since its earliest decisions,[31] and has been expanded in the judgement in Blake v. Guatemala.[32] In Advisory Opinion No. 18/03, on the legal status and rights of migrants,[33] the Inter-American Court referred expressly to the so-called "horizontal effect of human rights" in evaluating the obligation of States to guarantee the right to equality and non-discrimination in the relationship between employers and migrant workers. It follows that States parties to the IAHRS are obliged to take positive measures to guarantee human rights, including in relation to their actual or potential violation by private parties.[34]

Through its essential function of monitoring human rights, the IACHR has made reference since the 1980s to violations by a particular State in the territory of others. In its 1985 Report on th,

Surinamese State agents of a climate of threats and harassment against Surinamese citizens in th Netherlands.[36]

Within the framework of the petition and case system, there are two scenarios in which the

for the attribution of responsibility that requires more depth analysis of the concepts of: (i) support, acquiescence, or tolerance of the acts of private parties; and (ii) the link between the international violation and the authority of the respondent State.[45] With respect to the first element, there are several precedents in the IAHRS that, although they refer to support for or acquiescence to violations committed within the jurisdiction of the respondent State,[46] could be applied to violations perpetrated in the territory of other countries when the support or acquiescence comes from the respondent State. As for the nexus between the acts of private parties and the home State, the IAHRS could find support in the progress made in the European system, where the ECHR has held that the tolerance by a State's authorities for private conduct that violates the rights of third parties in another country's territory could give rise to responsibility of the home State.[47]

In its document Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy,[48] the organization ESCR-Net examines the application of extraterritorial obligations (ETOs) by thematic committees and special rapporteurships of the UN, in particular with respect to economic, social, and cultural rights. In explaining the content of the ETOs, ESCR-Net stated that:

> The obligation to protect human rights has been used most often in the context of corporate accountability, although the obligations to respect and to fulfill are also relevant. […] Regarding the obligation to fulfill, as business enterprises are legal entities subject to an incorporation and regulation framework manager by the state, states should take constructive steps to apply or amend, as relevant, this overarching framework to ensure that business enterprise activities are in harmony with the state's human rights obligations, including positive obligations to further human rights. This might entail positive measures regarding public expenditure priorities, the corporate capture of politics and law-making, taxation developments, education initiatives, and so on, to address existing systemic flaws conducive to corporate human rights violations.[49]

There is a tendency in the thematic committees of the Universal System to issue general comments recommending that the States change laws or policies that are conducive to the commission of human rights violations in the territories of third countries. In the case of the IAHRS, although there has not been a similar trend, the IACHR will publish a Report on Extractive Industries and the Rights of Indigenous and Afro-descendant Peoples in the Americas in the coming months. That

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document is expected to include the standards of the Universal System and progress in the accountability of the home States of corporations that violate human rights in third countries.

Extraterritorial human rights obligations in soft law instruments – Maastricht Principles

The Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights[50] were adopted by international experts, and offer a reformulation of the customary and treaty-based rules regarding ETOs. Published in 2011, the principles underscore that "All States have obligations to respect, protect and fulfill human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially,"[51] and that the

> States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsability of States is engaged when such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potencial impacts does not constitute justification for such conduct.[52]

Principle 8 also recognizes that the ETOs encompass "the acts and omissions of a State within or beyond its territory."[53] Similarly, Principle 24 establishes that the extraterritorial obligation to protect includes the requirement that

> [a]ll States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set forth in Principle 25, such as private individuals and organisations, and transnacional corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights.[54]

Although the Maastricht Principles are not a "hard law" instrument validated by States, their content systematizes the international standards in force at the time they were drafted. In this regard, they can guide the interpretation of the IAHRS bodies, insofar as they reflect the norms established in

right to family protection, although in several similar cases, the Court has not declared a violation of this guarantee.

In view of the above, the representatives of the alleged victims ask the State should possess a minimum knowledge of the jurisprudence of the Inter-American Court regarding Articles 16 and 17 of the ACHR. It is important to stress that the controversy surrounding these provisions is subsidiary to the other elements of fact and law of the hypothetical case. Therefore, the management of one or two precedents of the Inter-American Court would satisfy the knowledge required to argue for or against the violation of those provisions.

II.3 Consultation and prior, free, and informed consent of the Pichicha and Orífuna Peoples

The hypothetical case contains certain facts related to the obligation of the State of Santa Clara to engage in prior consultation with the indigenous Pichicha People, who reside in Santa Clara, and the Afro-descendant Orífuna People, who live in the Republic of Madruga. A consultation process was conducted with the Pichicha People, in which the representative authorities decided to accept the mining exploration project, provided that certain safeguards were observed. The main controversy surrounding the consultation process has to do with an environmental accident that took place on May 15, 2011, consisting of the rupture of a small tailings rock containment dam by the Silverfield mining company[63]. After the accident, the authorities of Santa Clara had to take exceptional measures that involved restricting the territorial rights of the Pichicha People. In order to ensure the continual supply of potable water to the indigenous and non-indigenous population affected by the dam's rupture, a decision was made to enter the sacred lands of the Pichicha People and distribute water to the affected population from the Mandí Stream, which the Pichicha considered inviolable.

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Declaration. The Commission has asserted that the "the criterion for self-identification is the principal one for determining the condition of indigenous people, both individually and collectively."[75] Similarly, the Inter-American Court has established collective self-identification as a determining factor. In its judgment in the Case of the Xákmok Kásek Indigenous Community. v. Paraguay held that:

> The identification of the Community, from its name to its membership, is a social and historical fact that is part of its autonomy. (…) Therefore, the Court and the State must restrict themselves to respecting the corresponding decision made by the Community; in other words, the way in which it identifies itself.[76]

It should be emphasized that, under international human rights law, indigenous peoples or communities need not be registered or organized by the State in order to be entitled to and exercise their rights.[77]

Collective property rights of indigenous peon1.13 Td(o)-1(us)-58-4(n1.13 Td(o)-1(us)-58-4(n1.h2r i)

The IACHR and the Inter-American Court have adopted an interpretation of Article 21 of the ACHR that goes beyond the traditional interpretation of the right to property. In the case of the Mayagna (Sumo) Awas Tingni Community v. the Republic of Nicaragua, the Court found that:

> Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention—which precludes a restrictive interpretation of rights—it is the opinion of this Court 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, which is also recognized by the Constitution of Nicaragua.[81]

In this judgment, the Court notes the importance of the recognition of collective land ownership rights to the physical and cultural survival of indigenous peoples, stating that, "For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[82]

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b) Prior social and environmental impact studies

The third guarantee is the performance of a prior social and environmental impact study, by "independent and technically capable entities, under the State's supervision."[108] The ultimate aim of social and environmental impact studies is to "preserve, protect, and guarantee the special relationship" of indigenous peoples with their territories and to guarantee their survival as peoples.[109] In the opinion of the Inter-American Court, Article 21 of the ACHR is violated when the State fails to conduct or supervise social and environmental studies prior to granting the concessions.[110]

In addition, it has held that social and environmental studies must be carried out prior to the approval of the respective plans,[111] and requires States to allow indigenous peoples to participate in conducting the prior social and environmental impact studies.[112] In general terms, social and environmental studies "must respect the [respective indigenous or tribal] people's traditions and culture,"[113] and their results must be shared with the communities in order for them to be able to make an informed decision.

In cases involving measures that affect an indigenous people or community without providing the aforementioned guarantees, the Inter-American Court has attributed international responsibility to the State for the violation of Article 21 of the ACHR, and has ruled that, "with regard to the

the IAHRS have no rulings declaring the violation of the non-regression of ESCR in light of the absence of a process of free, prior and informed consultation. Therefore, the representatives of State are in a better position to arguing that the IACHR' conclusions in its Merits Report are groundless.

In its judgment in the Case of the Xákmok Kásek Indigenous Community v. Paraguay, the Inter-American Court

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ECHR. Bankovic and Others v. Belgium and Others. Judgment of 12 December 2001.

ECHR. Drozd and Janousek v. France and Spain, Judgment of 26 June 1992.

ECHR. Issa and Others v. Turkey. Judgment of 16 November 2004.

ECHR. Loizidou v. Turkey. Judgment of 23 March 1995.

ECHR. Young, James and Webster v. United Kingdom, 13 August 1981.

ECHR. X and Y v. Netherlands, 26 March 1985.

ECHR. Cyprus v. Turkey, 26 May 1975.