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2012 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

INTER-AMERICAN COURT OF HUMAN RIGHTS

Chupanky Community et al.

Applicants

v.

The State of Atlantis

Respondent

REPRESENTATIVES FOR THE VICTIMS

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II. STATEMENT OF THE FACTS

The State of Atlantis (the State) ratified the American Convention on Human Rights (ACHR) with the 1994 Constitution and accepted the contentious jurisdiction of the Inter-American Court (IACtHR) on January 1, 1995.[1] In the east of Atlantis, one can find a tropical rain forest and the Motompalmo river, along which different ethnic groups and peasant communities live. The region is characterized by the highest poverty/social exclusion rates.[2] Before the colonization, there were several important indigenous cultures whose members were subjected to slavery during the European era. Later on, there was a policy of extermination and in the 1970's, the government implemented an assimilation policy.[3] In 1990, the National Reconciliation Agreement was signed and in 1994 the rights of the indigenous groups were recognized. Today, Atlantis recognizes 11% of its population as being indigenous, but there is a lot of controversy concerning other groups.[4] Attempting to resolve energy shortages, the Energy and Development Commission (EDC), a parastatal entity, launched a call for bids to build the Black Swan Hydroelectric Power Plant (Black Swan Project) along the Motompalmo. After a 2003 feasibility study, it was decided to build the project in the Chupuncué region[5], inhabited by the Chupanky and La Loma Communities[6]. The former belongs to the Rapstan indigenous nation, which traditionally are settled along the Motompalmo (or "Xuxani"), which is essential for their way of life. Not only is the river sacred according to their cosmovision, it also connects them to other Rapstan communities. In August 1987, they signed the Peace Treaty with the Earth, along with the other Rapstan communities, which long process will end with the celebration of 'Day One', marking the new beginning of integration with their essential nature. The Chupanky mainly live from

[1] Hypothetical, para. 31, p. 9.
[2] Hypothetical para. 1, p. 1.
[3] Hypothetical para. 2, p. 1.
[4] Hypothetical paras. 2 and 3, p. 1 and 2.
[5] Hypothetical para. 5, p. 2.
[6] Hypothetical para. 6, p. 2.

fishing, hunting and farming, and produce handicrafts. In recent decades, they organized themselves in a patriarchal structure, with the Council of Elders as their main political organ.[7] The La Loma community formed itself during the 1980's, due to the governmental Assimilation Policy. The Rapstan women were forced into mixed-race marriages, causing their expulsion from their original communities. They then founded their own new community along the Motompalmo. They preserved many of their Rapstan cultural traditions, which are intrinsically connected to the Xuxani, and organized in a matriarchal structure. In 1985, the government officially recognized the La Loma as a peasant-farming community.[8] In January 2005, the EDC granted the concession for the Black Swan Project to the mixed-capital Turbo Water Company (TW).[9] The project was divided into 3 phases. Phase 1: reaching agreement with the property-owners of the affected territories. Phase 2: the drainage and construction of reservoirs. Phase 3: irrigation, testing and operation.[10] In April 2005, the State declared the project site of public utility and in June it initiated negotiations with the members of the La Loma community. Alternative agricultural lands +/-25 km from the Motompalmo were offered. 25% of the La Loma owners accepted the offer, while 75% rejected it, claiming their cultural ties to the Xuxani.[11] In November 2005, the State initiated expropriation proceedings before a civil court, in order to set the amount for compensation. In February 2006, that court decided for immediate occupation of the project area in order to start phase 2. The La Loma were then dispossessed and relocated into temporary camps.[12] According to the statement of some community members in the newspaper El Oscurin Pegri, living conditions in these camps are poor and they wish to return to normal way of life and their lands. In March 2006, the rejecting property owners requested before the civil court to be

[7] Hypothetical, para. 7, p. 2 and 3.
[8] Hypothetical, para. 8, p. 3.
[9] Clarification Questions and Answers, No. 32
[10] Hypothetical, para. 10, p. 4.
[11] Hypothetical, para. 11, p. 4.
[12] Hypothetical, para. 12, p. 4.

granted the same rights as if they were indigenous, which was denied since they were officially recognized as a peasant-farming community in 1985. The Court then ordered an expert opinion to set the final amount. The community members contested this opinion since they did not intend to sell their lands[13]. In November 2007, the State began consultations with the Chupanky Community via the Council of Elders and the male heads of households and this through the Intersectoral Committee, containing government officials and TW representatives.[14] The Chupanky were also offered alternative lands, which would be of good agricultural quality and surpassing the size of their original lands, located +/- 35 km from the Motompalmo. The relocation would be done in Phase 3. The State also offered work to all members over the age of 16 and environmental impact studies would be conducted. The Chupanky would also receive 3 PCs, 8 water wells, a direct access road to the Motompalmo and the entire community would be provided with electricity. In December 2007, phase 1 & 2 of the project was approved by a majority vote. The decision on phase 3 would follow later, when phase 2 was completed.[15] In January 2008, Mina Chak Luna and her "Rainbow Warrior Women" protested against the project, claiming the women were not consulted and therefore the approval of the project was invalid and discriminatory. Firstly, they wanted to meet with the Project Director of TW but he denied. Secondly, they sent their complaint to the Intersectoral Committee, which brushed them off promising to evaluate their petition.[16] On February 28, 2008, the Ministry of the Environment & Natural Resources (MENR) assigned the environmental and social impact studies to the organization of the Green Energy Resources, along with independent experts. According to the MENR, the results of this study were positive in favor of the project, due to the provision of electricity to the community. However, the dam could cause geological damage. The MENR then sent a Spanish copy of

[13] Hypothetical, para. 13, p. 4.
[14] Hypothetical, para. 14, p. 5.
[15] Hypothetical para. 15, p. 5.
[16] Hypothetical para. 17, p. 6.

this report to the Chupanky Community.[17] On June 20, 2008, the men started to work with the TW, as divers or masons for $4.50/day, and the women as cooks and cleaners, for $2,00/day. The first 2 months, everyone worked 9h/day. After that, the men had to work up to 15h/day[18] and as a result, the women had to work a different schedule every day.[19] According to a medical report from 'Doctors without Borders'[20], requested by the Rainbow Warrior Women, 4 of the initial 7 divers suffered decompression syndrome, causing partial disability, due to lack of specialized, quality equipment and the minor training they received.[21] 50 of the 215 masons held working conditions to be exploitative and they did not receive overtime pay. This, combined with the fact that the women worked different schedules every day, negatively affected their traditional lifestyle. In addition, fishing in the area was reportedly disturbed. This all gave rise to concerns about river travel and the celebration of Day One.[22] On December 10, 2008, the Rainbow Warrior Women and the La Loma community complained before the EDC and the MENR, claiming discrimination and environmental harm. They met with the deputy director of the EDC and an employee of the MENR. Still these brushed off the complaints, stating they would study the issue.[23] Subsequently, the Council of Elders decided to convoke a general community assembly, during which the community vetoed the project, leading to TW threats to sue the workers for breach of contract and increasing their demands. They also tried to remove the Chupanky as soon as possible from their lands.[24] Firstly, the Council of Elders filed an administrative claim before the EDC, through the NGO "Morpho Azul", but the claim was denied[25]; Secondly, it complained before the Court for the Judicial Review of Administrative Acts (CJR). The CJR judged that the community did not

[17] Clarification Questions and Answers, No. 11.
[18] Hypothetical, para. 19, p. 6.
[19] Hypothetical, para. 20, p. 6.
[20] Clarification Questions and Answers, No. 85.
[21] Clarification Questions and Answers, No. 10.
[22] Hypothetical, para. 20, p. 6.
[23] Hypothetical para. 21, p. 7.
[24] Hypothetical, para. 22, p. 7.
[25] Hypothetical, para. 23, p. 7.

have the right to veto the project. Also, it alleged that the discrimination of women would be the result of their own customs and traditions. Concerning the employment claims, the CJR declared itself incompetent[26]; Thirdly, the Supreme Court of Justice also denied their claim, ruling that the authorities complied with (inter)national law.[27] Finally, a petition was submitted to the Inter-American Commission (IACHR). The IACHR established a violation of Art.s 1.1, 4.1, 5.1, 6.2, 21 and 25 of the ACHR concerning the Chupanky Community and of Art.s 5.1, 21 and 25 to the detriment of the La Loma Community. Atlantis should also adopt precautionary measures to postpone the execution of the project pending its decision on the merits. Given the State's incompliance with the recommendations, the IACHR brought the case before the IACtHR on October 4, 2011 and asked it to adopt provisional measures.[28]

III. LEGAL ANALYSIS

A. Statement of jurisdiction

It is not contested that the IACtHR has jurisdiction based upon Art. 62 ACHR. Atlantis ratified the ACHR and accepted the contentious jurisdiction of the IACtHR.[29] All facts occurred after the date of ratification.

B. Statement of admissibility: domestic remedies

First it must be noted that the State has not filed preliminary objections before the IACHR.[30] The position of the IACtHR is clear: "*The objection of asserting non-exhaustion of domestic remedies should be filed at the admissibility stage of the proceeding before the Commission otherwise it is presumed that the State has tacitly waived the presentation of this argument.*"[31] In any way, pursuant to Art. 46.1 (a) ACHR, the applicants exhausted all domestic

[26] Hypothetical, para. 24, p. 7-8.
[27] Hypothetical, para. 25, p. 8.
[28] Hypothetical, paras. 28-29, p. 8-9.
[29] Hypothetical, para. 31, p. 9.
[30] Hypothetical, para. 27, p. 8.
[31] L. BURGORGUE-LARSEN AND A. UBEDA DE TORRES, *The Inter-American Court of Human Rights*, Oxford, Oxford University Press, 2011, 133.

remedies.[32] Only proceedings concerning the setting of the final amount of the La Loma expropriation are still pending. According to Art. 46.2 (c) ACHR the obligation to exhaust domestic remedies is not applicable in case of an unwarranted delay in rendering a final judgment. The IACtHR upholds four criteria[33] for the reasonable time limit.[34] The setting of a final compensation amount cannot be considered a complex matter, nor have the La Loma caused any delays in the proceedings. The delay in rendering a final decision is only due to the conduct of the judicial authorities. In the past, the IACtHR deemed that a proceeding lasting over five years far exceeded the 'reasonable time'.[35] There is no disputing that the reasonable time limit has been exceeded.

C. Request for provisional measures

The victims' representatives support the IACHR's request for provisional measures (PM's) pursuant to Art. 63.2 ACHR for (A) the Chupanky's benefit, and maintain their request regarding the La Loma. PM's are also requested with regard to (B) the Chupanky divers with partial disability resulting from caisson disease. Three conditions must be fulfilled in order to grant PM's: extreme gravity, urgency and risk of irreparable damage to persons:

(A) 1° The situation is of extreme gravity: a continuation of the project will result in permanent loss of land for the Chupanky/La Loma. This implies serious consequences for the

[32] Art. 46(1)(a) of the American Convention on Human Rights; art. 32 of the Rules of Procedure of the Inter-American Commission on Human Rights.
[33] Case of Kawas Fernandez v. Honduras, 2009 Inter-Am. Ct. H.R. (ser. C) No. 196, (April. 30, 2009), para. 112.
[34] Case of Genie Lacayo v. Nicaragua, 1997 Inter-Am. Ct. H.R. (ser. C) No. 30, (Jan. 29, 1997), para. 77; Case of Serano Cruz Sisters v. El Salvador, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, (March 1, 2005), para. 67; Case; Case of Ricardo Canese v. Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, (Aug. 31, 2004), para. 141; Case of Paniagua Morales et al. v. Guatemala, 1996 Inter-Am. Ct. H.R. (ser. C) No. 23 (Feb. 25, 1996) para.. 41; L. BURGORGUE-LARSEN AND A. UBEDA DE TORRES, *The Inter-American Court of Human Rights*, Oxford, Oxford University Press, 2011, 142; Case of Wimmer v. Germany, 2005 ECHR No. 60534/00 (Feb. 24, 2005), paras. 23-35.
[35] Case of the Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, (June 17, 2005) paras. 85-86; Case of Suárez-Rosero v. Ecuador, 1997 Inter-Am. Ct. H.R. (ser. C) No. 51, (Nov. 12, 1997), para. 73; Case of Genie Lacayo v. Nicaragua, para. 81; Case of Las Palmeras v. Colombia, 2000 Inter-Am. Ct. H.R. (ser.C) No. 67 (Feb. 4, 2000), para. 38; J. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, Cambridge University Press, 2003, 134; L. BURGORGUE-LARSEN AND A. UBEDA DE TORRES, *The Inter-American Court of Human Rights*, Oxford, Oxford University Press, 2011, 142.

Communities as a whole as well as for every individual member. Moreover, the La Loma are living in deplorable conditions, threatening their right to life/personal integrity/health. The Chupanky are at risk of finding themselves in the same situation. Given that the above-mentioned rights are endangered, the condition of extreme gravity is fulfilled. There is a real danger: every day the communities' way of life is severely affected;[36] 2° Urgency implies that the risk or threat involved must be imminent. Everyday more workers can become ill and family ties can be broken. This especially affects children and women; 3° Irreparable damage[37] will be unpreventable if the project continues. The right to life/personal integrity/children rights/and the land for both Communities will be irreparably damaged. If the right to the communities' property is infringed, it would cause much more than economic damage, as it would affect the very survival of the collectivity. The harmful effects of relocation, forcefully and without regard to traditions are documented.[38] It is a well-known fact in the media that the Chupanky received serious threats[39], so the danger is very real.

(B) 1° The situation is extremely grave: 4 Chupanky divers suffer from caisson disease, that often leads to future health complications/problems; 2° The situation is urgent/real: caisson symptoms are likely to recur, especially with heavy caisson patients. Moreover the divers have only been provided with 'vouchers for medical exams' at the Tripol Hospital[40], without the ensuing provision of 'specialised medical treatment'; 3° Absence of specialist medical treatment leads to health deterioration and thus irreparable damage. The ECtHR has ordered the transfer of ill people to a specialized hospital for treatment, where specialized medical

[36] Communities of the Jiguamiandó and of the Curbaradó v. Colombia 2000 Inter-Am. Ct. H. R. (ser. E) (Nov. 24, 2000) Considerations para. 2.
[37] Monagas Judicial Confinement Center ("La Pica"); Yare I and Yare II Capital Region Penitentiary Center (Yare Prison); Penitentiary Center of the Central Occidental Region (Uribana Prison) and Capital El Rodeo I and Rodeo II Judicial Confinement Cente v. Venezuela, 2009, Inter-Am. Ct. H. R. (Nov. 24, 2009), considerations para. 2.
[38] IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, para. 42.
[39] Hypothetical, para. 20 & 22, p. 7 & 8.
[40] Hypothetical, para. 20, p. 7 and Clarification Questions and Answers, no 44.

attention was absent[41], which is the case for the Chupanky, for whom even basic health care is not available.[42] In light of the above the victims' representatives request the IACtHR to order the suspension of the project pending a decision on the merits, as well as the immediate transfer of the 4 divers to a specialized hospital in order to provide them with specialized treatment. In case of non-compliance with the PM's, a violation of Art. 63.2 ACHR should be found.[43]

D. Statement of violations

i. The State violated Art. 21 (Right to Property) in relation to Art. 1.1 (Obligation to respect the rights) ACHR with respect to the Chupanky Community and the La Loma Community.

a. Specific conditions concerning Indigenous Peoples.

1) The La Loma are an indigenous community.

There is no formal international definition of an indigenous community. However, various international instruments and bodies have attempted to define this concept.[44] The most notable is Art. 1.1.b ILO Convention 169[45], ratified by Atlantis[46], which states: "*Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social,*

[41] Case of Kotsaftis v. Greece, 2008 ECHR, no. 39780/06 (June 12, 2008), para. 36; Case of Aleksanyan v. Russia, 2008 ECHR, no. 46468/06 (Dec. 22, 2008), para. 230.
[42] Hypothetical, para. 20, p. 7.
[43] C. BURBANO HERRERA AND Y. HAECK, Letting States off the Hook? The Paradox of Legal Consequences following State Non-Compliance with Provisional Measures in the Inter-American and European Systems, Netherlands Quarterly of Human Rights, 28/3, 332.
[44] Working Paper by the Chairperson – Rapporteur Erica-Irene Daes, on the concept of 'indigenous people', E/CN.4/Sub.2/AC.4/1996/2; The concept of indigenous peoples, background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues, PFII/2004/ws.1/3; Indigenous and Tribal people's rights over their ancestral lands and natural resources: Norms and Jurisprudence of the Inter-American Human Rights System, Inter-Am. C.H.R. OEA/Ser.L/V/II., Doc. 56/09 (Dec. 30 2009), para. 25.
[45] Indigenous and Tribal Populations Convention International Labour Organization, Convention No. 169, June 27, 1989.
[46] Hypothetical, para. 31, p. 9

economic, cultural and political institutions." The IACtHR confirmed that ILO Convention 169 can be taken into account while interpreting Art. 21 ACHR.[47]

This definition consists of 3 objective and 1 subjective elements.[48] Firstly, the historical continuity criterion requires a descent from precolonization societies. The La Loma descend from the Rapstan people. It was only due to the Assimilation Policy[49] and the subsequent mixed-race marriages that they were banned from their original communities and founded the La Loma Community. The Community retained many of the Rapstaní traditions, which are intrinsically tied to the Motompalmo. Therefore, the La Loma have close ties to their lands and to the river, as do all other Rapstan communities[50], by which they also fulfill the second condition, namely a territorial connection. Thirdly, they have to retain their own distinctive social, economic, cultural and political institutions. The La Loma still speak their dialect partially and they kept the economic organization of the community. Lastly, there is a subjective element, namely that the group should identify itself as being indigenous. As pointed out in Art. 1.2. ILO Convention 169, a legal status does not determine whether a community is indigenous or not. The concept of self-identification refers to the core sense of their identity. The La Loma consider themselves indigenous. Their request before the Civil Court[51] to be granted the same rights as other indigenous groups is the explicit manifestation of that feeling. In conclusion, the La Loma Community fulfills the 4 elements. The La Loma should equally be recognized as an indigenous group. Seeing the case law of *Saramaka*[52], if the La Loma are indigenous, we apply the three-headed Test.

2) Three-headed Test.

[47] Case of the Yakye Axa Indigenous Community v. Paraguay, para. 127.
[48] ILO, "Indigenous & Tribal peoples' rights in practice – A guide to ILO Convention No. 169" Programme to Promote ILO Convention No. 169 (PRO 169), International Labour Standards Department, 2009, p. 9; Case of Ituango-massacre v. Colombia, 2006 Inter-Am. Ct. H.R (ser. C) No. 148, (July 1, 2006), para. 155; Case of Minors in Detention v. Honduras, Case 11.491, Report No. 41/99 (March 10, 1999), footnote 38; Case of the Saramaka People v. Suriname, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007), para. 92.
[49] Hypothetical, para. 2, p.1.
[50] Hypothetical, para. 7, p. 2.
[51] Hypothetical para. 13, p. 4.
[52] Case of the Saramaka People v. Suriname, para. 129.

The Chupanky Community holds a legal title for its ancestral territories[53], situated in the region of the Project.[54] The IACtHR has extended the right to property in *Awas Tingni* to the rights of members of an indigenous community to hold communal property.[55] The La Loma retain legal title to their lands as well, as individual landowners.[56] In order to assure the survival of both communities, when limiting their property rights, the State must abide by 3 safeguards established by the IACtHR in *Saramaka*.[57] For these protection measurements to apply, the indigenous territory should fall within the scope of a development or investment plan, defined by the IACtHR as "*any proposed activity that may affect the integrity of the lands and natural resources within the territory of the indigenous community*".[58] The Project is a large-scale development project that will affect the whole Chupanky territory. A large part of their land will be used and eventually flooded.[59] On the westside of the Motompalmo, the Project will cover the entire La Loma territory.[60] Thus, the State must ensure: 1° the effective participation of the indigenous community's members, in conformity with their customs and traditions; 2° the community's reception of a mutual benefit; 3° that no concession will be issued within the indigenous territory unless/until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.[61]

a) Right to consultation and free, prior and informed consent.

This is widely supported in international and regional spheres.[62] Specifically for large-scale investment projects with a major impact on indigenous territory, the IACtHR imposed an

[53] Clarification Questions and Answers, No. 60.
[54] Hypothetical, para. 5, p. 2.
[55] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paras. 148-149.
[56] Clarification Questions and Answers, No. 112.
[57] Case of the Saramaka People v. Suriname, para. 129.
[58] Case of the Saramaka People v. Suriname, footnote 127.
[59] Hypothetical, para. 15, p. 5.
[60] Hypothetical, para. 6, p. 2.
[61] Case of the Saramaka People v. Suriname, para. 129.
[62] Art. 26 United Nations Declaration on the Rights of Indigenous Peoples, Sep. 13, 2007; Art. 15.2 International Labour Organization, Indigenous and Tribal Populations Convention No. 169, June 27, 1989; Art. 14.7 Record

additional duty for the State to obtain the free, prior and informed consent of the indigenous communities involved[63], in accordance with ILO Convention 169[64] and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[65] They must be able to influence the actual decision-making.[66] Regarding the Chupanky Community, Phase 1 & 2 of the project were approved.[67] However, this consent was not valid because it was nor prior nor informed.

Firstly, the consent must be prior. The IACtHR emphasized in *Saramaka* that the consultations should take place at the early stages of the development plan[68], as similarly indicated by the current UN Special Rapporteur on the Rights of Indigenous People.[69] The IACHR stressed in the *Maya Indigenous Communities of the Toledo District* that this is before granting a concession.[70] Atlantis did not meet this requirement. The decision to build was made in Nov. 2003.[71] The exact location, which covers the Chupanky Community territory, was known since Feb. 2004.[72] The State continued its plans and granted the concession to the TW in Jan. 2005.[73] However, at this point the Chupanky were still not included in the project nor notified. It was not until Nov. 2007, 4 years after the project started and only under (inter)national pressure, that the State decided to begin the consultation processes with the Chupanky.[74] By waiting 4 years, the State has well surpassed the timeframe of an early

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on the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples, March 27, 2008, GT/DADIN/doc.301/07; Western Sahara, Advisory Opinion, 1975 I.C.J. (October 16); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001) para. 164; Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02 (Dec. 27, 2002), para. 131.

[63] Case of the Saramaka People v. Suriname, para. 134.

[64] Art. 16 ILO Convention No. 169.

[65] Art. 10 and 32 United Nations Declaration on the Rights of Indigenous Peoples.

[66] UNHRC, Apirana Mahuika et al. v. New Zealand (17th session, 2000), U.N. Doc. CCPR/C/70/D/547/1993, Nov. 15, 2000, para. 9.6; Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. James Anaya, U.N. Doc. A/HRC/12/34 (July 15, 2009), para. 65.

[67] Hypothetical, para. 15, p. 5.

[68] Case of the Saramaka People v. Suriname, para. 133.

[69] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. James Anaya, U.N. Doc. A/HRC/12/34 (July 15, 2009), para. 65.

[70] UNHRC, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04 (Oct. 12, 2004), para. 143.

[71] Hypothetical, para. 5, p. 2.

[72] Hypothetical, para. 6, p. 2.

[73] Hypothetical, para. 10, p. 4.

[74] Hypothetical, para. 14, p. 5.

notice.[75] Secondly, several problems prove that the consent was not informed. To begin with, early notice is necessary for allowing "*time for internal discussions within the community and proper feedback to the State*".[76] ILO Convention 169 demands consultations to take place in good faith.[77] The only way to achieve this is to allow enough time for effective decision-making. Only 1 month after beginning the consultation processes, the voting over the first 2 phases of the Project took place. These were approved by majority vote[78], which might not have been the case if there had been sufficient time for inner reflection. A 2nd problem constitutes that when approving Phase 1 & 2 of the Project, there was no information concerning environmental and health risks. The IACtHR specified that the State must 'ensure'[79] and therefore take legal steps[80] to provide that this information will be received. Studies concerning these important issues had not even begun, Green Energy Resources only initiated the studies on Feb. 28, 2008.[81] The IACHR confirmed this in the *Maya Indigenous Communities of the Toledo District Case*, stating "*that all of the members of the community are fully and accurately informed on the nature and consequences of the process*".[82] It is clear that the State should only have allowed voting after explaining all risks to the Chupanky. Given the limited and insufficient information the Community received, it was unaware of the massive impact and devastating consequences of the project on their Community and cannot have given a fully informed consent.

Regarding the La Loma, the State failed completely. As stated above, the La Loma are to be considered indigenous. Therefore the State also had to obtain their free, prior and informed consent. However, the State did not consult the community/ask its consent. In Nov. 2003, the

[75] Hypothetical, para. 14, p. 5.
[76] Case of the Saramaka People v. Suriname, para. 133.
[77] Art. 6.2 ILO Convention No. 169 and Case of the Saramaka People v. Suriname, para. 133.
[78] Hypothetical, para. 15, p. 5.
[79] Case of the Saramaka People v. Suriname, para. 133.
[80] Case of Vélasquez Rodriguez v. Honduras, para. 174.
[81] Hypothetical, para. 18, p. 6.
[82] UNCHR, Maya Indigenous Communities of the Toledo District v. Belize, para. 142.

government decided to build the dam on La Loma territory.[83] In Jan. 2005, the concession was granted.[84] Only in June 2005, the La Loma learned about the project, when negotiations concerning their land started.[85] All crucial decisions had already been taken.

b) Right to veto the project in the light of changed circumstances.

Phase 3 of the Project has never received the Chupanky's consent and therefore it cannot start. The IACHR confirmed the importance of consent, and this "must not be limited to notification or quantification of damages".[86] Specifically for the building of hydroelectric dams, the thematic review of The World Commission on Dams –established between the World Bank and World Conservation Union– is an important touchstone.[87] In its report it stressed the significance of consent of indigenous people.[88] The World Bank Group and Extractive Industries acknowledges the consent of the affected people as well. Moreover, this consent must be given "throughout each phase of a project cycle"[89], as agrees the Committee of Experts on the ILO Convention 169.[90] The IACtHR has made the final call that consent implies a right to veto. The IACtHR has made a clear distinction in *Saramaka* between 'consultation', required for all types of projects, and 'consent', mandatory for large-scale development projects.[91] The previous UN Special Rapporteur on the Rights of Indigenous People, shared the opinion of the IACtHR and found that indigenous people have veto power dealing with large-scale projects. The communities should be able "*to determine their own pace of change*", meaning the right to say no.[92] This point of view is supported by

[83] Hypothetical, para. 5, p. 2
[84] Hypothetical, para. 10, p. 4
[85] Hypothetical, para. 12, p. 4.
[86] *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, Inter-Am. C.H.R. OEA/Ser.L/V/II, Doc. 34 (June 28, 2007), para. 248.
[87] United Nations Environment Programme, http://www.unep.org/dams/WCD/, consulted on 26 March 2012.
[88] World Commission on Dams, Dams and Development: A New Framework for Decision-making, Nov. 2000, Londen and Sterling, 215-216.
[89] The World Bank Group and Extractive Industries, *Striking a Better Balance. The Final Report of the Extractive Industries Review*, Vol. I, December 2003, 21.
[90] Committee of Experts, General Observation, 2008, published 2009.
[91] Case of the Saramaka People v. Suriname, para. 136.
[92] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. Rodolfo Stavenhagen, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003), para. 66.

international authorities.[93] The decision to object to the continuation of Phase 3 is legitimate.[94]

With regard to Phase 2 of the Project, the Chupanky have withdrawn their consent on Dec. 20, 2008.[95] This was a logical consequence of changed conditions: 1) The working conditions were significantly altered after the consent. The findings of the Rainbow Warrior Women on the exploitative and unhealthy working conditions shed a new light on the consent;[96] 2) The ESIA provided additional information to the Chupanky, stating that the project could change the ecosystem. This is a relevant new fact, given the Chupanky's relation to the nature and their fishing traditions. The consultations had consequently not taken place in good faith, as required by the IACtHR[97] and ILO Convention 169.[98] The Chupanky had no choice but to withdraw the consent for Phase 2 and veto Phase 3.[99] The State omitted to start new consultations in light of the modified circumstances. In such a case, the ILO Committee has found that the duty to consult is not met.[100] The *African Model Law* gives indigenous people a similar right to withdraw their consent.[101] Mutual agreements are founded on the consent of parties. Future actions within the scope of the agreement must be consistent with this consent-based relationship.[102] "*The consent of the parties is thus an ongoing and integral element of*

[93] United Nations Economic and Social Council, Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, U.N. Doc. E/CN.4/Sub.2/AC.4/2002/3 (June 17, 2002), para. 52; General Recommendation 23, Committee on Elimination of Racial Discrimination, 51st Sess., A/52/18, August 18, 1997; Resolution of European Union Council of Ministers, Indigenous Peoples within the framework of the development cooperation of the Community and Member States (1998), para. 5.
[94] Hypothetical, para. 22, p. 7.
[95] Hypothetical, para. 22, p. 7.
[96] Hypothetical, para. 20, p. 6.
[97] Case of the Saramaka People v. Suriname, para. 133.
[98] Art. 6.2 ILO Convention No. 169.
[99] Hypothetical, para. 22, p. 7.
[100] Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association, ILO Doc. GB.282/14/3 (Nov. 14, 2001), paras. 18 and 61.
[101] African Model Legislation for the Protection of the Right of Local Communities, Farmers and Breedes, and for the Regulation of Access to Biological Resources, Oct. 6, 1998, 20.
[102] Art. 10-15 Vienna Convention on the Law of Treaties, May 23, 1969.

treaty relations between indigenous peoples and states and is central to the performance of treaty obligations and treaty interpretation", as said by the UN Commission on HR.[103]

c) Prior environmental and social impact assessment.

The State violated the rights of the Chupanky with respect to the environmental impact assessment on two aspects. Firstly, contrary to the IACtHR's jurisprudence, as well as several international bodies[104], these impact studies were conducted after the consultation process was completed.[105] The consultations were finalized in Dec. 2007[106], while the MENR only ordered Green Energy Resources to perform the study in February 2008.[107] Moreover, the State should have consulted the Community as to results of the study, not merely sent them a copy, so to guarantee actual participation.[108] Secondly, the Community received a true and accurate copy of the study in Spanish, not translated in the official Rapstani language.[109] In the *Lopez-Alvarez*, the IACtHR states that the language of indigenous people is an element belonging to their cultural identity, which means it is of the utmost importance.[110] Art. 30.2 ILO Convention 169 formulates the obligation to translate and use indigenous languages in consultation processes.[111] The lack thereof might inhibit the Community's full understanding of the study and impact of the project on their lives. These elements are also foreseen in the *Akwé Kon Guidelines*[112], which, according to the IACHR, need to be followed when

[103] CHR, Legal commentary on the concept of free, prior and informed consent, E/CN.4/Sub.2/AC.4/2005/WP.1. (July 14, 2005), para. 48.
[104] Art. 7.3 ILO Convention No. 169; World Bank, Operational Manual 4.10 – Indigenous Peoples, para. 9 (July 2005); Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. Rodolfo Stavenhagen, E/CN.4/2003/90 (Jan. 21, 2003), para. 74.
[105] Case of the Saramaka People v. Suriname, para. 129.
[106] Hypothetical, para. 15, p. 5.
[107] Hypothetical, para. 18, p. 6.
[108] Case of the Saramaka People v. Suriname, para. 16.
[109] Clarification Questions and Answers, No. 11.
[110] Case of Lopez-Alvarez v. Honduras, 2006 Inter-Am. Ct. H.R. (ser. C) No. 141 (Feb. 1, 2006), para. 171.
[111] Art. 16 ILO Convention No. 169.
[112] Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, COP-7 (Kuala Lumpur, February 9-20, 2004), Decision VII/16, Annex.

performing an environmental and social impact assessment.[113] Regarding the La Loma, the State did not comply with the first aforementioned requirement. The La Loma were already expropriated when the environmental impact studies were conducted.[114]

d) Benefit-sharing.

The Intersectoral Committee offered the Chupanky a compensation for the deprivation of their property, through employment opportunities, electrical power, 3 PC's, 8 water wells and alternative lands. A yet to build direct highway will lead them to the Motompalmo. No monetary compensation was offered.[115] As project-partners, indigenous peoples contribute with natural resources and thus are entitled to share in the benefits.[116] The IACtHR derived this principle Art. 21.2 ACHR, as an indispensable part of just compensation.[117] In casu, the Chupanky are deprived of their sacred lands. Their cultural traditions, e.g. honoring their dead, revolve around this land and the Motompalmo. Additionally, the celebration of Day One on Dec. 21 can only take place near the river, on ancestral territories.[118] It is the most important and long anticipated event of their spiritual lives, making the threshold for a just compensation very high. Any compensation in the form of benefit-sharing, must redress this loss of cultural traditions. In the light of the Project's devastating impact on the Chupanky, the 'benefits' offered are neglectable, also taking into account the huge profit for the State.[119] The job opportunities e.g. have proven to be a poisonous gift, given the exploitative conditions (see *III. D. iv.*). The water wells cannot be considered a real benefit, since this is providing basic social services, which the State must provide anyway.[120] The only real benefits were

[113] Indigenous and Tribal people's rights over their ancestral lands and natural resources: Norms and Jurisprudence of the Inter-American Human Rights System, Inter-Am. C.H.R. OEA/Ser.L/V/II., Doc. 56/09, para. 17 (Dec. 30 2009).
[114] Hypothetical, para. 12, p. 4 and para. 18, p. 6.
[115] Hypothetical, para. 15, p. 5.
[116] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. Rodolfo Stavenhagen, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003), paras. 52 and 70.
[117] Art. 21.2 American Convention of Human Rights.
[118] Hypothetical, para. 7, p. 3.
[119] Hypothetical, para. 6, p. 2.
[120] Case of the Yakye Axa Indigenous Community v. Paraguay, para. 162.

electricity and 3 PC's.[121] The remaining compensation offered, are the alternative lands. This cannot be a sufficient compensation, since the traditions are not restored in this way. Thus, only a monetary compensation and adequate lands can be seen as a reasonably share in the benefits. Although an imperfect solution, this would at least allow the community to allocate the funds in a culturally appropriate way. The situation of the benefit-sharing is even worse for the La Loma who will not share any benefits. Primarily, the La Loma were offered alternative lands, located 25km from the Motompalmo, which has an equally important cultural meaning as for the Chupanky. According to Art. 16 ILO Convention 169, peoples have the right to choose between alternative lands or a money.[122] Only alternative lands along the Motompalmo could perhaps have compensated the loss of their original lands. Subsidiarily, the rejecting La Loma landowners were offered money.[123] In the Oct. 2006 expert report, this compensation was set at $5/m² and an accessory 3% disturbance damages.[124] This compensation does not represent the market value of the lots[125], let alone the cultural-historical value. As held in the ECHR, the compensation price should be much higher.[126] Clearly, the La Loma do not receive a just compensation.

b. General conditions under Art. 21 ACHR.

The State must meet 4 cumulative conditions, in placing restrictions on the right to property. They must be previously established by law, necessary, proportional, and with the aim of achieving a legitimate objective in a democratic society. These conditions were confirmed by the IACtHR.[127] In the *Saramaka Case,* the IACtHR pointed out another supplementary condition specifically for indigenous people.[128] The State cannot deny the cultural traditions of the indigenous communities in a way that would endanger their very survival as a

[121] Hypothetical, para. 5, p. 2.
[122] Art. 16.4 ILO Convention No. 169.
[123] Hypothetical, para. 12, p. 4.
[124] Clarification Questions and Answers no. 84.
[125] Clarification Questions and Answers no. 54.
[126] Case of Kozacioglu v. Turkey, 2009 ECHR, no. 2334/03 (Febr. 19, 2009), para. 67.
[127] Case of the Yakye Axa Indigenous Community v. Paraguay, para. 144.
[128] Case of the Saramaka people v. Suriname, para. 128.

community. For the Chupanky as well as for the La Loma, the State failed to respect these conditions.

1) With regard to the Chupanky Community.

The Chupanky hold a legally recognized title for their ancestral lands.[129] In this case, the State failed to respect at least 2 of the aforementioned conditions. These conditions apply whether or not the consent was valid. In several cases the IACtHR pointed out the vulnerable nature of indigenous peoples.[130] The State clearly has a position of power. The aforementioned conditions can serve to create a more level playing field.[131]

Concerning the necessity of the restrictions. Atlantis does not prove that building a dam is the only possibility for further development. The economy of Atlantis is still growing[132], even without interference. Moreover, even if the State would prove that the building of a dam is necessary, it does not prove that it was necessary to use the Chupanky lands. The location was decided upon after a feasibility study of Nov. 2003.[133] The only goal of such a study however, is to estimate economic costs and benefits.[134] Human suffering was not a criterion when considering alternative sites. Secondly, the restrictions must be proportionate. The State did not meet this condition. The IACtHR specified that the rights of the State over property should not always overturn indigenous rights.[135] The IACHR[136] and the UNHRC[137] decided that development needs cannot infringe upon fundamental right of indigenous people. This is

[129] Clarification Questions and Answers, No. 60.
[130] Case of the Sawhoyamaxa Indigenous Community v. Paraguay, para. 83; Case of the Yakye Axa Indigenous Community v. Paraguay, para. 63.
[131] United Nations Human Rights Committee, General Recommendation 23, The rights of minorities (Article 27) (50th session, 1994), U.N. Doc. CCCPR/C/21/Rev.1/Add.5 (April 8, 1994), para. 6.2.
[132] Hypothetical, para. 1, p. 1.
[133] Hypothetical, para. 5, p. 2.
[134] W. BEHRENS AND P.M. HAWRANEK, *Manual for the prepara.tion of industrial feasilibity studies*, Vienna, UNIDO Publication, 1991, 404 p.
[135] Case of the Yakye Axa Indigenous Community v. Paraguay, para. 149.
[136] UNHCR, Maya Indigenous Communities of the Toledo District v. Belize, para. 150.
[137] UNHCR, Chief Bernard Ominayak and Lubicon Lake Band v. Canada (38th session, 1990), U.N. Doc. CCPR/C/38/D/167/1984, March 26, 1990, paras. 23 and 33.

internationally supported.[138] Balancing is crucial. The rights of affected people are gaining importance.[139] When the impact on the community's life is large, the UNHRC concludes faster to a violation of the right to cultural integrity[140], often applied in relation to Art. 21 ACHR.[141] The relocation away from the river will make it impossible for the Chupanky to continue fishing and use the river for transportation. It will result in the loss of their self-sufficiency.[142] Even more importantly, by relocating the Chupanky, its spiritual bond with the ancestral lands and the river will be cut. The State must respect and protect these important elements.[143] Given the grave impact on the lives of the Chupanky, their interests must outweigh purely economic interests. Finally, the supplementary restriction must be addressed. In order for the Chupanky to survive as a community, they must be able to continue their traditional ways of life.[144] The State had the responsibility to take into account their possible survival.

2) With regard to the La Loma Community.

Once again, the State failed to respect at least 2 of the aforementioned conditions. First, concerning the necessity, the La Loma refer to the argumentation as set out for the Chupanky (*see III. D. i. b. 1)*). Second, the condition of proportionality was not met. The IACtHR stated that proportionality means "*interfering as little as possible with the effective exercise of the restricted right'*[145]. The La Loma's close cultural and spiritual ties to the river[146] are the central element of their community life. Losing these lands will disrupt their traditional way

[138] Art. 6.1, United Nations Declaration on the Right to Development, Dec. 4, 1986; Principle 22, Rio Declaration on Environment and Development, Aug.12, 1992; World Commission on Dams, Dams and Development: A New Framework for Decision-making, London and Sterling, Nov. 2000, p. 204; [138] Case of Chassagnou and Others v. France, 1999 ECHR, No. 25088/94, 28331/95 and 28443/95 (April 29, 1999), para. 112.
[139] World Commission on Dams, Dams and Development: A New Framework for Decision-making, London and Sterling, Nov. 2000, p. 205.
[140] UNHCR, Sandra Lovelace v. Canada, U.N. Doc. CCPR/C/OP/1, Dec. 29, 1977, para. 16.
[141] Case of the Saramaka People v. Suriname, para. 93.
[142] Hypothetical, para. 15, p. 5.
[143] Art. 13 ILO Convention No. 169.
[144] Case of the Saramaka People v. Suriname, para. 121.
[145] Case of the Yakye Axa Indigenous Community v. Paraguay, para. 145.
[146] Hypothetical para. 8, p. 3.

of life. Expropriating and relocating the La Loma to temporary camps[147] is not at all a minor interference. In addition, deprivation of property requires 3 conditions, i.e. public utility or social interest, forms established by law and upon payment of a just compensation. These conditions are the same as set in international law.[148] These conditions were not met, given the lack of sufficient compensation (*see III. D. i. a. 2) d)).* The state failed compliance with Art. 21.2 ACHR.

The supplementary restriction also applies to the La Loma. Given that they are indigenous, the state cannot deny their traditions in a way that would endanger their survival as a community.[149] By forcing the La Loma to live at least 25 km from the Motompalmo, the La Loma risk to lose every sense of remaining Rapstan traditions. This would extinct their indigenous identity. Considering the above, Atlantis has violated Art. 21 in relation to Art. 1.1 of the ACHR.

ii. The State violated Art. 4.1 (Right to Life) and Art. 21 and Art. 1.1 ACHR with respect to the Chupanky Community.

The IACtHR stated that, in order to ensure the right to life, the State must generate minimum living conditions that are compatible with the dignity of the human person.[150] If the State cannot respect this right, all other rights become meaningless.[151] The cultural integrity of indigenous peoples is intrinsically linked with their ancestral lands, which are necessary for their survival.[152] Territory constitutes the very subsistence of the Chupanky's life.[153] Firstly,

[147] Hypothetical, para. 12, p. 4.
[148] Permanent Sovereignty over Natural Resources, Report of the Secretary-General, UN Doc. E/C.7/1983/5, April 7, 1983; International Court of Justice, Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, 1977, YCA 1979; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, March 20, 1952, ETS no. 009.
[149] Case of the Saramaka People v. Suriname, para. 128.
[150] Case of Villagran-Morales et al. v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, (Nov.19, 1999), para. 144; Case of the the Yakye Axa Indigenous Community v. Paraguay, para. 162.
[151] Case of the Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, (March 29, 2006), para. 150.
[152] Case of the Yakye Axa Indigenous Community v. Paraguay, para. 133; Case of the Saramaka People v. Suriname, para. 139.

the offered alternative lands are not adapted to the needs of the Chupanky Community. A failure of the State to protect the right to property stated by Art. 21 ACHR implies the failure of the State's duty to guarantee the life of the indigenous community[154], which is also stated in the *Yakye* Axa.[155] In this case, the alternative land is meant for agriculture, it is not adapted to the ways the Chupanky Community provides in its food, namely, hunting, fishing and planting seeds.[156] Art. 16.4 of the ILO Convention 169 affirms that alternative land should be suitable to provide for present and future developments of indigenous people.[157] The alternative lands that the Chupanky Community will receive cannot safeguard their existence. The State may provide the Chupanky with drinking water, but other elements to live their life with dignity, such as health, education, housing and food, are not provided.[158] Therefore the State violates Art. 4.1, in relation to Art. 21 and Art. 1.1 ACHR.[159]

iii. The State violated Art. 5.1 (Right to Humane Treatment) in relation to Art. 1.1 ACHR with respect to both the Chupanky and the La Loma Community.

Art. 5.2 ACHR entails the absolute right not to be subjected to inhuman treatment[160], while Art. 5.1 ACHR protects the integrity of every human being. Both provisions are interconnected in ensuring that everyone has the right to a dignified life. According to the IACtHR's case law, both Art.s can be invoked together.[161] Under Art. 5.2 a distinction is

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[153] UNHCR, Maya Indigenous Communities of the Toledo District v. Belize, para. 155; *Democracy and Human Rights in Venezuela*, Inter-Am. C.H.R. Doc. OEA/Ser.L/V/II, Doc. 54 (Dec. 30, 2009), para. 1054.
[154] *Indigenous and Tribal people's rights over their ancestral lands and natural resources: Norms and Jurisprudence of the Inter - American Human Rights System*, Inter-Am. C.H.R. OEA/Ser.L/V/II., Doc. 56/09 (Dec. 30 2009), para. 154.
[155] Case of the Yakye Axa Indigenous Community v. Paraguay, para. 164.
[156] Hypothetical, paras. 7 and 15, p. 3 and 5.
[157] Art. 16.4 ILO Convention No. 169.
[158] Hypothetical, para. 15, p. 5.
[159] The Yakye Axa Indigenous Community v. Paraguay, para. 162.
[160] Lysias Fleury and his family v. the Republic of Haiti, 2009 Application IACHR. Case 12.459, (Aug. 5, 2009), para. 53; Case of Bueno Alves v. Argentina, 2007 Inter-Am. Ct. H. R. (ser. C) No. 164 (May 11, 2007), para. 76.
[161] Case of Ximenes-Lopes v. Brazil, 2006 Inter-Am. Ct. H. R. (ser. C) No. 149, (July 4, 2006); Case of the "Juvenile Reeducation Institute" v. Paraguay, 2004 Inter-Am. Ct. H. R. (ser. C) No.112, (Sept. 2, 2004); Case of the "Street Children"; Case of Paniagua Morales et al. v. Guatemala, 1998 Inter-Am. Ct. H. R. (ser. C) No. 37, (March 8, 1998); Case of Castillo-Páez v. Peru, 1997 Inter-Am. Ct. H.R. (ser. C) No. 34, (Nov. 3, 1997); Case of Bulacio v. Argentina, 2003 Inter-Am. Ct. H. R. (ser. C) No. 100, (Sep. 18, 2003).

made between different gradations of prohibited treatment, from torture to cruel, inhuman or degrading treatment.[162] The IACtHR and the IACHR derived guiding principles from the ECHR case law, accepting that inhuman treatment must cause bodily harm or intense physical or mental suffering[163], without the need for intent to cause suffering.[164] The right to humane treatment and the right to protect life entail positive obligations for the State to ensure that all members of the community have full enjoyment of this right.[165] By relocating the La Loma to temporary camps, they suffered a violation of Art. 4.1, Art. 5.1 and Art. 1.1 ACHR. In the *Moiwana* the IACtHR explicitely confirmed the possibility for representatives to submit violations to the American Convention that were not submitted by the Commission, as long as the arguments for those violations were based upon facts set out in the application.[166] The failure of the State to provide decent living conditions in the camps constitutes a violation of Art. 4.1 in relation to Art. 1.1 ACHR. Firstly, concerning the relocation to temporary camps. In the instant case, the La Loma now live in temporary camps, away from the river. This means that they are currently unable to maintain their way of life. This also implies that they are not able to bury their dead according to their traditions, causing great grief. Consequently, by obliging the La Loma to leave their land behind, the State created living conditions that are not respectful of their way of life. In this way the State is depriving the La Loma Community of their own history. In *Moiwana* the IACtHR found this to be in violation of Art. 5 ACHR.[167] While the State may argue that the situation the La Loma are currently in, is self induced, because they refused the alternative lands the State offered them, the close relationship they have with their land must be taken into account. Given the forced relocation and the inability

[162] Case of Loayza Tamayo v. Peru, 1998 Inter-Am. Ct. H.R., (ser. C) No. 42, (Nov. 27, 1998) para. 57.
[163] Case of Kudla v. Poland, 2000 ECHR, no. 30210/96 (Oct. 26, 2000), para. 92.
[164] Case of Ireland v. UK, 1978 ECHR, no. 25 (Jan. 18, 1978), para. 78.
[165] F.F. BASCH, "The doctrine of the Inter-American Court of Human Rights regarding States' Duty to punish human rights violations and its dangers", 23 *Academy on Human Rights and Humanitarian Law Articles and Essays Analyzing Reparations In International Human Rights Law* 200.
[166] Case of the Moiwana Community v. Suriname, 2005 Inter-Am. Ct. H. R. (ser C) No. 124 (June 15, 2005), para. 91.
[167] Case of the Moiwana Community, para. 93.

to honor the dead, the State violated Art. 5.1 and Art. 1.1 ACHR.[168] Moreover, by acting this way, the State put the community's right to preserve and pass on its cultural legacy into jeopardy and created a permanent threat to the very survival of the members of the Community, which, in addition, constitutes a violation of Art. 4.1 and Art. 1 ACHR.

Secondly, concerning the conditions of poverty. The living conditions of the La Loma, a vulnerable group in the Atlantis society amount to inhuman treatment violating Art. 4.1 and Art. 1.1 ACHR, given that the State failed to ensure minimum living conditions. The IACtHR found that the necessary conditions for a dignified life are encompassed in Art. 4.1. States are required to guarantee the creation of the conditions required in order that violations of this basic right do not occur.[169] In this case, the living conditions in which the members of the Community live in poverty, i.e. in camps without minimum conditions of hygiene, etc., leave them in a extremely vulnerable situation, which might even threaten the survival of the community members. The mere fact that alternative lands were rejected by the community, does not relieve the State from its obligation to guarantee the right to a decent life.[170] In *Sawhoyamaxa,* the IACtHR stressed that the duty to take measures that ensure the fulfillment of the right to a decent life becomes a high priority for vulnerable persons.[171] In *Yakye Axa,* the IACtHR moreover held that "*special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity*".[172] Therefore Art. 4.1 clearly requires a minimum

[168] Case of the Moiwana Community v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005), para. 93.
[169] Case of Villagran-Morales et al. v. Guatemala, para. 144; Case of the Yakye Axa Indigenous Community v. Paraguay, para. 161; Case of Ximenes-Lopes v. Brazil, para. 138; Case of the Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006), paras. 161-162.
[170] Case of Sawhoyamaxa v. Paraguay, paras. 163-164.
[171] Case of Sawhoyamaxa v. Paraguay, para. 162.
[172] Case of the Yakye Axa Indigenous Community v. Paraguay, para. 167.

access to sufficient food and water, sanitary services and health care.[173] This was not respected by the State in this case, a situation on which public statements have been made by certain La Loma.

iv. The State violated Art. 4.1 (Right to Life) in relation to Art. 1.1 ACHR with respect to the Chupanky Community.

Firstly, it cannot be denied that the State bears a direct responsibility for the working conditions of the Chupanky workers. The violations of the ACHR are attributable to the State. The State is a 40% shareholder in the TW.[174] By consequence, it has a very influential position within the company and can heavily weigh on all its policy decisions. The State has the duty to prevent human rights violations, no matter what role it assumes, including that of company shareholder. In this case, the responsibility of the State is all the more certain, since it was actively involved in every step of the Black Swan Project.

Art. 6.2 ACHR states: *"No one shall be required to perform forced or compulsory labor"*. Forced labor means that *"people that are subjected to psychological or physical coercion in order to perform work, which they would not otherwise have freely chosen"*.[175] The IACtHR considered that *"human rights treaties are living instruments whose interpretation must take into consideration changes over time and current conditions"*.[176] This means that the rights protected by the ACHR should be interpreted in the light of present-day conditions.

Many members of the Chupanky Community originally agreed to work on the Black Swan Project.[177] However, meanwhile a situation of psychological coercion has been created. Entire Chupanky families work on the project and are almost completely dependent of TW. TW has

[173] Case of the Xámok Kásek Indigenous Community v. Paraguay, 2010 Inter-Am. Ct. H.R., (ser. C) No. 214, (Aug. 24, 2010), paras. 215-217.
[174] Hypothetical, para. 10, p. 5.
[175] ILO, "Indigenous & Tribal peoples' rights in practice – A guide to ILO Convention No. 169." Programme to Promote ILO Convention No. 169 (PRO 169), International Labour Standards Department, 2009, 157.
[176] Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, (July 1, 2006), para. 155.
[177] Hypothetical, para. 19 , p. 6.

profited from this by unilaterally changing the working conditions, including prolonging the work day from 9 to 15 hours for the men, without a raise in wage. All attempts to stand up against TW, have been answered by threats of firing everyone, suing them for breach of contract and by taking actions towards the accelerated removal of the Chupanky from their lands.[178] In light thereof, the Chupanky have ended up in a situation of forced labor.

Furthermore, the working conditions do not guarantee a dignified life. The wages in Atlantis average between US $300 and $600/month.[179] The minimum wage in Atlantis is $250.[180] However, the Chupanky men receive a wage of $4.50 and the women $2,00 per day. This is far below standard, which goes against Art. 5 ILO Convention 131[181] since the State did not take appropriate measures to ensure the minimum wage. Art. 7 (a) San Salvador Protocol[182] requires that the remuneration must guarantee dignified and decent living conditions, which is clearly not the case here. Art. 7(g) San Salvador Protocol[183] states that "*everyone shall enjoy the [right to work] under just, equitable, and satisfactory conditions, with respect to a reasonable limitation of working hours, both daily and weekly*". In accordance to Art. 2 ILO Convention 1[184], the working hours may "*not exceed eight hours in the day and forty-eight in the week*". It is clear that a fifteen hour working day exceeds a reasonable limitation of working hours. Without a doubt these working conditions are an infringement of the right to a dignified life. Taking into consideration all of the above, Atlantis violated Art. 4.1 and Art. 6.2 in relation to Art. 1.1 ACHR.

v. The State violated Art. 21 (Right to Property) in relation to Art. 1.1 (Obligation to respect the rights) ACHR with respect to the treatment of the Chupanky women.

[178] Hypothetical, para. 22, p. 7.
[179] Clarification Questions and Answers No. 23.
[180] Clarification Questions and Answers No. 50.
[181] Minimum Wage Fixing Convention, International Labour Organization, Convention No. 131, June 3, 1970.
[182] Additional protocol to the American Convention on Human Rights in the area of economic, social and cultural rights « Protocol of San Salvador », Nov. 17, 1988, O.A.S. General Secretariat.
[183] Protocol of San Salvador.
[184] Hours of Work (Industry) Convention, International Labour Organization, Convention No.1, Oct. 29, 1919.

Art. 1.1 ACHR obliges the State to ensure to all persons the full exercise of the rights enshrined in the ACHR, without discrimination on the basis of sex. As the IACtHR noted: *"There is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination."*[185] The State discriminated the Chupanky women during the consultation processes. The State only consulted with the Council of Elders and the male heads of households in the Chupanky Community.[186] The voices of the Chupanky women were not heard at all. This is a blatant form of gender discrimination. The State justifies its discriminatory behavior by hiding behind the customs and practices of the Chupanky.[187] This cannot be considered a valid argument. Although the Chupanky are a patriarchal society, this is a fairly recent phenomenon.[188] It is not an inherent part of the their culture, but results from the State's Assimilation Policy.[189] Therefore, the State cannot invoke Chupanky customs for which it is to blame itself through its reprehensible policies of the past. Moreover, the existence of cultural customs does not discharge the State of its duty to strive for the elimination of gender discrimination. Art. 5 (a) CEDAW provides that States shall take all appropriate measures to modify the social and cultural patterns, achieving the elimination of all practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles.[190] Art. 22.2 UNDRIP urges States to protect indigenous women in particular against discrimination.[191] The State has never even attempted to include the Chupanky women in any way. Similarly, in the *Aloeboetoe Case,* the IACtHR expressed that indigenous customs must only be taken into account to the degree that they do

[185] Condition and Rights of Undocumented Migrants, Advisory Opinion OC -18/03, Inter-Am. Ct. H.R., (Ser.A) No. 18 (Sept. 17, 2003), para. 85.
[186] Hypothetical para. 14, p. 5.
[187] Hypothetical, para. 14, p. 6.
[188] Hypothetical, para. 7, p. 3.
[189] Clarification Questions & Answers, No. 36.
[190] Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979.
[191] United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007.

not contradict the ACHR.[192] It is clear, given the scope of Art. 1.1 ACHR, that customs excluding women from decision making processes, contradict the ACHR and cannot be used as an excuse by the State. Therefore, the State has violated Art. 21 in relation to Art. 1.1 ACHR

vi. The State violated Art. 4.1 (Right to Life) in relation to Art. 1.1 (Obligation to respect the rights) ACHR with respect to the treatment of the Chupanky women.

Art. 4.1 ACHR (right to life) holds the negative obligation "*not to be prevented from having access to the conditions that guarantee a dignified existence*".[193] There is a strong relation between labor conditions and a dignified existence. Art. 6 San Salvador Protocol states that the right to work includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.[194] Combined with Art. 1.1 ACHR, this right must be ensured without discrimination on the basis of sex. There is a broad consensus regarding equal employment opportunities in international law.[195] Art. 11(b) CEDAW specifically entails the right to the same employment opportunities for women, including the application of the same criteria for selection in matters of employment.[196] In casu, the women did not have the same employment opportunities, they were only offered the jobs of collecting/cooking food, and cleaning/washing clothes.[197] The women were clearly pushed into stereotypical "female" jobs and thus were discriminated against, this according to the IACHR[198], the ECSR Committee[199] and Art. 5(a) CEDAW.[200]

[192] Case of Aloeboetoe et al. v. Suriname, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15, (Sept. 10, 1993), para. 62.
[193] Case of Villagran-Morales v. Guatemala, para. 144.
[194] San Salvador Protocol
[195] San Salvador Protocol; ICESCR; Discrimination (Employment and Occupation) Convention, International Labour Organization, Convention No. 111, June 4, 1958; CEDAW.
[196] Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979.
[197] Hypothetical para. 19, p. 6.
[198] *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, Inter-Am. C.H.R OEA/Ser.L/V/II.143, Doc. 59 (Nov. 3 2011), para. 30.
[199] United Nations, Committee on Economic, Social and Cultural Rights, General Comment 20, *Non-Discrimination in Economic, Social and Cultural Rights* (Art. 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights), July 2, 2009, para. 20.

That the IACtHR does not take discrimination based on gender stereotypes lightly, is shown in *Cotton Field*, where it stated that the creation and use of stereotypes is one of the causes of violence against women.[201] Furthermore, not only could the women not choose their jobs freely, their wages were less than half of what the men earned ($2.00/day instead of $4.50/day).[202] This wage gap, which is closely tied to the unequal employment opportunities, is an infringement of the right to a dignified life of the Chupanky women. Art. 7(a) San Salvador Protocol requires that the remuneration must guarantee dignified and decent living conditions.[203] Art. 7(a)(i) ICESCR states that *"everyone has the right to the enjoyment of just and favorable conditions of work which ensure remunerations with fair wages and equal remuneration for work of equal value without distinction of any kind […]"*.[204] Therefore, the hard work of the Chupanky women is not accordingly valued and the remuneration does not guarantee a dignified living. As a conclusion, the State has violated Art. 4.1 in relation to Art. 1.1 ACHR concerning the employment conditions of the Chupanky women. Finally, considering all of the above, the State failed to adopt appropriate measures to protect lives, the physical, mental and moral integrity of the Chupanky women, in accordance with Art. 7.h Bélem do Pará in relation to Art. 4.a and Art. 4.b Bélem do Pará.[205]

vii. The State violated Art. 25 (Right to Judicial Protection) and Art. 8 (Right to a fair trial) in relation to 1.1 (Obligation to respect the rights) ACHR with respect to the La Loma Community and the Chupanky Community.

[200] Convention on the Elimination of All Forms of Discrimination against Women.
[201] Case of Gonzalez et al. v. Mexico, para. 401.
[202] Hypothetical para. 19, p. 6.
[203] Protocol of San Salvador.
[204] International Covenant of Economic, Social and Cultural Rights, Dec. 16, 1966.
[205] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against women "Convention of Belem do Pará", Sept. 6, 1994.

Art. 25.1 ACHR states that *"Everyone has the right to simple and prompt recourse, or any other effective recourse […]"*.[206] However, the State failed to provide a prompt and effective judicial recourse. The right to due process of the Chupanky was not respected since they were not granted all the guarantees and the judicial protection afforded in the ACHR. The Council of Elders took action in the national legal system, and was turned down in every instance. However, since 2009 every judge in Atlantis must exercise a conventionality control, even *ex officio,* with the ACHR in accordance with the IACtHR case law.[207] This is in line with the IACtHR's case law.[208] However, none of the addressed judges found a violation of the ACHR and manifestly misinterpreted established IACtHR case law (*see III. D. i.*). The CJR even stated that indigenous people do not have a right to veto referring to the *Saramaka* contrary to the actual IACtHR judgment.[209] Therefore, the judicial recourses cannot be deemed effective. Art. 8.1 ACHR holds that *"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal"*. Even after more than 5 years, the La Loma are still awaiting a final decision on the amount of the compensation for the expropriation. This exceeds the reasonable time limit. In that regard, the victims' representatives refer to the Statement of Admissibility. Therefore, there is a violation of Art. 8.1 and Art. 25 in relation to Article 1.1 ACHR.

IV. REQUEST FOR RELIEF

The victims' representatives respectfully request the IACtHR to declare that the State has violated the Articles 4.1, 5.1, 6.2, 21, 25 in relation to Article 1.1ACHR, and Article 63.2 ACHR in case of incompliance with PM's. If the IACtHR deems that there has been a violation of aforementioned rights, the victims' representatives asks the IACtHR to order the

[206] Art. 25.1 American Convention on Human Rights.
[207] Hypothetical, para. 4, p. 2.
[208] Case of Almonacid-Arellano et al v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C.) No. 154, (Sep. 26, 2006), para. 124; Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, 2006 Inter-Am. Ct. H.R. (ser. C) No. 158, (Nov. 24, 2006), para. 128.
[209] Hypothetical, para. 23, p. 7; Case of the Saramaka People v. Suriname, para. 136.

State to: a) pay a fair compensation to the La Loma and the Chupanky Communities for violations earlier exposed; b) take the necessary steps to fulfill its duty to organize the governmental apparatus to achieve the free and full exercise of human rights; c) review the domestic proceedings insofar as violations have been exposed and bring them in conformity with the rights protected under the ACHR; d) suspend the Black Swan Project; e) pay the costs/expenses incurred by the victims to litigate this case; f) regarding the Chupanky Community, to affirm their legal ownership over the land and to remove the TW Company thereof; g) regarding the La Loma, to recognize them as an indigenous Community and to reconstitute their legal title over the land; h) regarding the sick divers, to provide free specific medical attention as asked in the provisional measures; i) regarding the workers, to grant them minimum and equal wage; j) to guarantee the minimum living conditions required for a dignified life with regard to the La Loma relocated in the temporary camps; k) to publish the judgment and to translate it in Rapstaní.

Respectfully submitted,

Representatives for the Victims.