

Clarification Questions and Answers for the Twenty-First Inter-American Human Rights Moot Court Competition of the Academy on Human Rights and Humanitarian Law

- 1. Did the government of the Republic of Santa Clara conduct periodic reviews with respect to the purpose and lawful use of the funds transferred to Silverfield S.A. and Miningcorp S.A., among other companies, by the Public Foreign Investment Fund?**

Under the applicable laws of Santa Clara, there are no specific mechanisms for the periodic review of how loans from the Public Foreign Investment Fund are used by the borrower corporations.

- 2. As a Colonel in the Army of Santa Clara assigned to Santa Clara's Embassy in Madrugá, what were Colonel David Nelson's responsibilities, duties, and powers?**

Colonel David Nelson's responsibilities, duties, and powers are those typical of military attachés to a foreign country's Embassy or Permanent Mission.

- 3. What political activities were being conducted by the Madruga Confederation of Mineworkers and what interests was it pursuing during Mr. Edmundo Camana's term as president?**

The Madruga Confederation of Mineworkers limited itself to organizing peaceful marches, strikes, and labor negotiations with corporations and employers' associations. This was all done on behalf of the interests of the mining sector employees of the Republic of Madrugá.

- 4. With respect to paragraph 27 of the facts of the case, what are the specific acts that the criminal complaint filed in Santa Clara by members of the Camana Osorio family asks to have investigated?**

The criminal complaint referred to in paragraph 27 of the facts of the case seeks to have the judicial authorities of Santa Clara determine the criminal responsibility of Eliot Klein and David Nelson for the murders of the members of the Camana Osorio family that took place on December 12, 1994 and December 10, 2002.

- 5. With respect to paragraph 40 of the facts of the case, what suitable domestic proceeding is provided for under the laws of the State of Santa Clara to seek compensatory damages?**

According to the laws of the State of Santa Clara, the suitable action for filing compensatory claims against the government is adversarial administrative litigation. With respect to compensatory claims against private individuals, the suitable proceeding is a regular civil action.

- 6. With respect to paragraphs 50 and 51 of the facts of the case, should the articles of the ACHR that have allegedly been violated be examined in relation to Articles 1.1 and/or 2 thereof, or independently of them?**

This question goes beyond the clarification of the facts of the case and aims to clarify the interpretation of the Inter-American Commission and Court regarding obligations arising from the American Convention.

7. Will gold mining activity be conducted in Orifuna territory?

It follows from paragraphs 10 and 33 of the facts of the case that the extraction phase of the Wirikuya project will not be carried out in Orifuna territory, or in any part of the Republic of Madrugá. Although the extraction will take place exclusively on land located in Santa Clara, the authorities of that country have identified potential impacts on the territory of the Orifuna people, which is located entirely in the Atlantic region in the northern part of the Republic of Madrugá.

8. Was the Orifuna community engaged in any type of economic activity?

The communities that make up the Orifuna people are engaged in the economic activities specified in paragraph 10 of the facts of the case.

9. On what grounds was the petition for a constitutional remedy (*amparo*) brought by Catalina Coral in Madrugá, referred to in paragraph 46, found to be inadmissible?

The petition for a constitutional remedy (*amparo*) mentioned in paragraph 46 of the facts of the case was ruled inadmissible by the Supreme Court of Madrugá on the grounds that Catalina Coral lacked standing to represent the interests of the communal Orifuna landholdings.

10. Which articles of Santa Clara's Law of Extraterritorial Jurisdiction over Corruption and Human Trafficking regulate extraterritoriality and jurisdiction over matters related to corruption?

Article 20 of the 1998 Law of Extraterritorial Jurisdiction over Corruption and Human Trafficking establishes that acts of corruption committed by citizens or corporations headquartered in Santa Clara may be subject to civil and criminal actions under that country's jurisdiction, even if they have taken place abroad.

11. On what date was the call for bids referred to in paragraph 33 of the facts of the case issued for the Wirikuya project?

As stated in paragraph 36 of the facts of the case, the tendering and awarding of the Wirikuya project to Silverfield S.A. took place in February 2011.

12. According to the North American Free Trade and Development Agreement, and in the context of establishing corporations in the signatory countries, what system of responsibility is in place for the actions of a subsidiary company incorporated in a country other than the country of its headquarters?

The North American Free Trade and Development Agreement does not contain any provisions regulating the system of responsibility of corporations with subsidiaries or branches in one of the member countries. Each signatory country must regulate that issue in its civil and commercial law.

13. Since the weapon and modus operandi of the murderer of Lucia was very similar to those used in the murder of the rest of the family, is there any evidence of the State's involvement?

The only evidence of the potential participation of state agents from Santa Clara or the Republic of Madrugá is described in paragraphs 17-25 of the facts of the case.

14. Did the Silverfield S.A. company meet with all the relevant requirements to build a containment dam?

Silverfield S.A. formally obtained the license to build the containment dam referred to in paragraph 37 of the facts of the case. Expert technical studies have been undertaken to determine whether the company failed to meet the requirements set forth in the construction license for the dam, but the authorities of Santa Clara have not issued a final report on the matter to date.

15. Did Silverfield S.A. and the respondent State act according to the international FPIC-standards (in matters of paragraph 42- 46 of the hypothetical)?

This question goes beyond the clarification of the facts of the case and seeks to establish conclusions on the merits of the legal controversy.

16. It follows from paragraph 18 of the facts of the case that the two alleged perpetrators of the murders of Edmundo Camana, Teresa Osorio, and two of her sons died in an apparent confrontation between militia groups fighting for control of drug trafficking routes in northern Madrugá. Was it concluded from the respective investigations conducted by the Office of the Prosecutor General of Madrugá that any of the gangs involved in the apparent confrontation were from the Los Olivos militia group?

According to the information in the case file of the investigation mentioned in paragraph 18 of the facts of the case, Los Olivos was one of the unlawful groups involved in the confrontation that resulted in the deaths of two militia members in 1995. Given that the investigations into the December 12, 1994 murder were shelved, it was impossible to determine whether the dead militia members belonged to Los Olivos or one of the other unlawful groups operating in northern Madrugá.

17. It is understood from paragraph 20 of the facts of the case that the Public Ministry of Santa Clara decided not to bring charges against Eliot Klein for his alleged involvement in the bank deposits made by Miningcorp's subsidiary in Madrugá to companies owned by two leaders of the Los Olivos group, maintaining that it would jeopardize the investigations in Madrugá. Would it be possible to describe the characteristics (e.g., advancement of the proceedings, duration, findings, conclusions) of the investigations carried out at that time in Madrugá in relation to those alleged acts?

When the Public Ministry of Santa Clara decided not to bring charges against Eliot Klein, the criminal investigations in the Republic of Madrugá were at the preliminary stage before the Prosecutor's Office. As stated in paragraph 21 of the facts of the case, the investigations were quickly closed due to the expiration of the criminal statute of limitations for the offense of money laundering. The decision to close the investigation was issued by the Office of the Prosecutor of Madrugá two months after the decision of the Public Ministry of Santa Clara to not bring charges against Eliot Klein.

18. In relation to paragraph 47, on what basis did the Supreme Court of Santa Clara take cognizance of Catalina Coral's claim, given that the action was filed by the Human Rights Clinic of the University of Torongá?

The Human Rights Clinic of the University of Torongá merely acted as a legal representative of Catalina Coral and the Orifuna people.

19. Is the State of Santa Clara a signatory to any environmental law treaty?

The State of Santa Clara is a signatory to the Inter-American Agreement on the Fight against Lobsters and the Agreement on the International Program for the Conservation of Dolphins.

20. What criteria are applied under the laws of Santa Clara to establish jurisdiction over acts involving its nationals that may have been committed abroad? In other words, is jurisdiction over a specific act exercised by the country where the events occurred, or the country of origin of the agent who committed it?

The laws of Santa Clara do not expressly provide for judicial actions to be brought against its nationals or legal entities registered in its territory for acts that take place in other countries. However, since 1998, the Law of Extraterritorial Jurisdiction over Corruption and Human Trafficking has allowed for criminal or civil actions to be brought against nationals or legal entities from Santa Clara for the commission of one of those specific unlawful acts abroad.

21. With respect to the pollution of Lake Pampulla, did the State of Santa Clara inspect the dam? In other words, was the State diligent in the approval and monitoring of the construction when the license was granted in February 2011?

See the answer to question No. 14 above.

22. What do the laws of Santa Clara say about corporate environmental responsibility and its relationship to extractive activities on indigenous lands?

Santa Clara's laws on corporate environmental responsibility do not contain any specific provision addressing extractive activities on indigenous lands.

23. Paragraph 20 states that, following a preliminary investigation, the Public Ministry of Santa Clara decided not to bring a complaint against Eliot Klein. What would be the basis for bringing a criminal complaint under the criminal law of Santa Clara?

According to the criminal laws of Santa Clara, the Public Ministry is required to file a criminal complaint if it has *notitia criminis* of an offense that is subject to prosecution on the State's own initiative, and is supported by sufficient evidence of the materiality and perpetration of the offense by the accused. For purposes of the information contained in paragraph 20 of the facts of the case, the Bilateral Extradition Treaty between Santa Clara and the Republic of Madrugá expressly establishes the principle of *ne bis in idem*, thereby precluding the opening of criminal investigations against persons who are already under investigation for the same acts and offenses in another jurisdiction.

24. Paragraph 43 states that, according to Madrugan law, decisions on territorial rights must be made by each one of the 25 communal landholdings rather than by the Orifuna political authority. In this context, what does Madrugan law say about corporate environmental responsibility with respect to the use of indigenous lands and mineral extraction activities?

Santa Clara's laws on corporate environmental responsibility do not contain any specific provisions on the use of indigenous lands or mineral extraction activities.

25. Bearing in mind that the license to execute the Wirikuya project was granted in February 2011, what progress has been made on the project during the past 5 years?

The Wirikuya project remains at the exploration phase. The exploitation or extraction phase is anticipated to begin in July 2016. According to the applicable law in Santa Clara, before that phase of the mining project can begin, it is necessary to issue a new SEIS and conduct a new prior, free, and informed consultation process with the potentially affected indigenous and/or tribal peoples.

26. What is the purpose of the constitutional appeal alleging error on the part of the lower court that was filed with the Supreme Court of Santa Clara, what does it consist of, and under what circumstances can it be used?

According to the pertinent laws of Santa Clara, the constitutional appeal alleging error on the part of the lower court seeks to challenge the appeal decisions issued by the Civil Divisions on constitutional matters. The purpose of the appeal filed by Ricardo Manuín, described in paragraph 40 of the facts of the case, was to appeal, before the Supreme Court of Santa Clara, the decision of the Civil Division dismissing the petition for a constitutional remedy (*amparo*) described in paragraph 39.

27. What arguments did the State of Santa Clara present in the admissibility proceedings before the IACHR with respect to the preliminary objection of lack of territorial jurisdiction?

In its observations on admissibility and the competence of the IACHR, the State of Santa Clara maintained that the bodies of the IAHRs do not have territorial jurisdiction to hear and decide complaints alleging acts committed in the territory of third countries.

28. What constitutional and/or lesser provisions in the State of Santa Clara address dealings with indigenous and/or tribal populations?

The relevant constitutional and infra-constitutional framework of the State of Santa Clara on the rights of indigenous and tribal peoples is described in the facts of the hypothetical case.

29. What constitutional and/or lesser provisions in the State of Santa Clara address environmental and/or cultural matters?

The details of the legal provisions on environmental and cultural matters in the State of Santa Clara are not relevant for purposes of the facts described in the hypothetical case.

30. What do the laws and/or treaties signed by Santa Clara stipulate with respect to the process of obtaining an environmental license?

In pertinent part, the laws of Santa Clara establish that mineral exploration and exploitation licenses cannot be issued without the publication of a Social and Environmental Impact Study (SEIS) by the Department of the Environment. Licensing is conditioned upon compliance with the environmental and social safeguards provided for in the SEIS by the company that enters into the exploration or exploitation contract with the State.

31. Are Miningcorp and Silverfield "investor corporations" within the meaning of NAFTA and therefore subject to NAFTA's permanent arbitral panel?

Miningcorp and Silverfield are considered investor corporations under the terms of NAFTA.

32. On what dates did David Nelson conduct the three meetings with members of the outlawed Los Olivos militia at Miningcorp's offices in the city of San Blas?

The diplomatic cable published by Wikileaks in February 2006, mentioned in paragraph 25 of the facts of the case, indicates that the three meetings between members of Los Olivos and David Nelson took place between the years 2001 and 2003. There is no information on the exact dates of those meetings.

33. Do decisions made by the Pichicha's People's Assembly bind the Pichicha people or affect the greater Santa Clara government in any way?

According to the ancestral traditions of the Pichicha people, its Assembly is the highest political authority and sole body with jurisdiction to make decisions relating to the management of the Pichicha territory.

34. Was Lucía a minor child when her parents and brothers were murdered?

Lucía was 17 years old when her parents and brothers were murdered on December 12, 1994.

35. Why did the State of Santa Clara not revoke David Nelson's diplomatic status following his disciplinary suspension?

The Foreign Ministry of Santa Clara has never publicly explained the reasons for which it decided to maintain David Nelson's diplomatic status. Since February 2006, Nelson has held the position of Deputy Military Attaché to the Embassy of Santa Clara in Madrugá on disciplinary suspension without pay, and therefore his diplomatic status remains in effect.

36. Is there any relevant law in Santa Clara that defines a state of emergency and specifies when it allows for the restriction of rights?

The Constitution of Santa Clara contains a general provision that authorizes the issuance of emergency decrees or states of emergency in exceptional and well-founded situations. That constitutional provision was not applied in this specific case.

37. Has the State of Santa Clara suspended rights based on the declaration provided for in Article 27.3 of the American Convention on Human Rights?

The State of Santa Clara did not invoke the suspension of guarantees under the terms of Article 27.3 of the American Convention.

38. Under the laws of the State of Santa Clara, what is the legal basis for filing a petition for a constitutional remedy (*amparo*)?

According to the laws of Santa Clara, any person who believes that his or her constitutional rights have been violated by decisions of the State or private individuals conducting activities licensed by the State has standing to file a petition for a constitutional remedy (*amparo*). In the case of legal entities or collective legal entities, the laws of Santa Clara establish that the presidents, directors, or bodies authorized by law or under the bylaws of the respective entity have legal standing.

39. What are the traditional decision-making methods used by the Orífuna People?

In keeping with the ancestral traditions of the Orífuna, its People's Assembly is the sole entity authorized to make decisions about the management of the Orífuna territory. The Assembly is comprised by a representative from each communal landholding and a President, and its decisions are always adopted by consensus.

- 40. On what grounds did the Supreme Court of Madrugá determine that the writ of *amparo* filed by Catalina Coral, President of the Orífuna People's Assembly, was inadmissible?**

See the answer to question 9 above.

- 41. Santa Clara presented two technical reports on the Wiricuya Project: the first in May 2007 (submitted to the authorities of Madrugá), stating that there was no possibility that the project would directly affect the territory of any indigenous or tribal peoples in Madrugan territory; and the second, in April 2008, which maintained that the Pichicha people (in Santa Clara) and the Orífuna people (in Madrugá) could potentially be affected. What was the basis for these reports?**

The meeting held between Departments of the Government of Santa Clara and Madrugan authorities, described in paragraph 42 of the facts of the case, was held in May 2007, prior to the April 2008 issuance of the Social and Environmental Impact Study (SEIS) by the Department of the Environment of Santa Clara, referred to in paragraph 34. The studies mentioned in paragraphs 34 and 42 of the facts of the case were based on the information available at the date of their conclusion (May 2007 and April 2008).

- 42. In addition to the *habeas data* action, what other legal actions were taken in Madrugá, both on the government's own initiative and by the victim's relatives, after Lucía Camana Osorio's murder on December 10, 2002?**

According to the information contained in the case files of the investigations conducted in Madrugá with respect to Lucía Camana Osorio's death, her relatives filed more than 20 requests for the production of expert witness evidence and testimony, in their capacity as civil plaintiffs in a criminal proceeding. The individuals they asked to have brought into the investigations to provide statements included David Nelson and Eliot Klein. Unlike the *habeas data* action, which was granted by the Madrugan courts, the requests made by the relatives in their capacity as civil plaintiffs in the criminal proceeding were systematically dismissed by the Office of the Prosecutor, judges, and criminal courts of Madrugá.

- 43. Was there any arrest warrant, detention order, or similar order in Madrugá for the citizens not extradited by Santa Clara? If so, was there any trial or investigation in Santa Clara, and against whom?**

The judicial authorities of Madrugá have not issued arrest warrants in any of the criminal proceedings opened to investigate the murder of members of the Camana Osorio family.

- 44. According to the laws of Santa Clara, does the abuse of diplomatic privileges carry any criminal or civil penalties, or just administrative sanctions?**

Under the laws of Santa Clara, a public servant's abuse of his or her official duties is necessarily prosecutable as an administrative disciplinary infraction. In the event that it also constitutes criminal conduct, it must be prosecuted through the pertinent criminal and civil proceedings, on the government's own initiative or at the request of another party, as established by law.

- 45. What preventive measures did Silverfield S.A. take in relation to the construction works of the Wirikuya project?**

See the answer to question 14 above.

- 46. According to paragraph 16 of the facts of the case of Edmundo Camana *et al.*, Pichicha and Orífuna peoples v. Santa Clara, are disputes related to the rights of indigenous communities located in the signatory countries included among those that are submitted to the arbitration system provided for in the North American Free Trade and Development Agreement signed by Santa Clara, the Confederation of Bristol, and the Republic of Madrugá?**

The North American Free Trade and Development Agreement (NAFTDA), described in paragraph 16 of the facts of the case, exclusively governs disputes related to the investments of corporations from one of the three signatory countries, without any mention of rights of indigenous or tribal peoples. The only entities authorized to submit claims to arbitration under the framework of NAFTDA are investor corporations that believe they have suffered some type of harm as a result of the decisions of the bodies or authorities of one of the signatory States.

- 47. With respect to paragraph 40 of the hypothetical case, what is the nature and scope of the constitutional appeal alleging error on the part of the lower court that Ricardo Manuín filed with the Supreme Court of Santa Clara after the previously ordered injunction was lifted and his *amparo* action was shelved?**

See the answer to question 26 above.

- 48. What were David Nelson's duties as Colonel of the Army of Santa Clara assigned to his country's embassy in the Republic of Madrugá as Deputy Military Attaché from 2000 to 2006?**

See the answer to question 2 above.

- 49. What is the relationship between the three murders and the pollution of the indigenous lands?**

This question goes beyond the clarification of the facts of the hypothetical case.

- 50. What fundamental rights were allegedly violated, according to the constitutional actions?**

The constitutional actions filed in the jurisdictions of Madrugá and Santa Clara were based on the violation of fundamental rights related to the provisions of the American Convention that the Inter-American Commission on Human Rights declared to have been violated in Merits Report No. 17/15.

- 51. Was there any case concerning the 500 people murdered by the militia?**

Although several criminal proceedings were opened to investigate the murders and other abuses attributed to unlawful militia groups operating in the northern area of the Republic of Madrugá, to date there has only been one final judgment of conviction against three members of the Los Olivos militia group. That decision was handed down in July 2014. Most of the crimes committed by the unlawful militias in Madrugá have still not been subject to any type of final judicial response.

- 52. According to paragraph 38 of the facts, on what legal basis did the FWA issue its order for the immediate decontamination of Pampulla Lake, and for the provisional collection of water from local streams, including the Mandí Stream?**

The Federal Water Authority (FWA) is the administrative entity responsible for the distribution of potable water in the State of Santa Clara. Under the applicable law, the FWA is authorized to take urgent measures, including allowing its officials to gain temporary access to private property, in order to guarantee the supply of potable water to populations affected by environmental disasters.

- 53. According to paragraph 29 of the facts, why did the Foreign Ministry of the Republic of Madruga issue Official Letter No. 001.2962?**

Official Letter No. 001.2962 was issued by the Foreign Ministry of the Republic of Madruga for purposes of informing the judicial authorities of Santa Clara of the status of the criminal investigations into the murder of members of the Camana Osorio family. The letter was issued pursuant to a letter rogatory from the Civil Courts of Santa Clara that heard the judicial actions described in paragraphs 27 and 28 of the facts of the case.

- 54. According to paragraph 40 of the facts, when the Supreme Court of Santa Clara ruled the writ of *amparo* inadmissible, what remedy was it referring to as a suitable mechanism for asserting compensatory claims?**

See the answer to question 5 above.

- 55. Did the militia members who murdered the Camana Osorio family on December 12, 1994 belong to the Los Olivos militia group?**

The Madruga authorities have not been able to determine, in a final court judgment, who was responsible for the December 12, 1994 murder of the members of the Camana Osorio family. The only information regarding the identity of the direct perpetrators of the crime is described in section III of the facts of the case and in the answer to clarification question 16 above.

- 56. On what factual basis did the human rights organizations in Madruga find that the error in the calculation of the statute of limitations in the investigation against the two leaders of the Los Olivos militia group for the offense of money laundering involved collusion between the prosecutor's office and Miningcorp?**

For several years now, national and international human rights organizations have been claiming that mining companies operating in the region have paid bribes to members of the Office of the Prosecutor to encourage impunity for the widespread violence in northern Madruga. Those organizations maintain that the mining companies—most of which are subsidiaries of companies headquartered in Santa Clara—are the ones who benefit the most from the acts of harassment, threats, and murder carried out by the unlawful armed militias that operate in northern Madruga.

- 57. What health consequences did the Pichicha population experience as a result of the pollution of Pampulla Lake?**

No member of the Pichicha people or the communities surrounding Pampulla Lake ever consumed water that was contaminated by the residues spilled in the May 15, 2011 accident. The main impact on the health of the affected persons consisted of the rationing of the potable water supply for a few days until the Federal Water Authority was able to resume supplying water from alternative sources other than the Pampulla Lake.

58. How old was Lucía Camana Osorio in 1994? Paragraph No. 17 of the hypothetical case.

See the answer to question 34 above.

59. When paragraph 16 of the hypothetical case states that “any dispute” between investor corporations and the three NAFTA signatory countries must be adjudicated by an arbitral panel, should this be understood to refer only to commercial disputes, or does it include disputes of any other nature, such as those concerning public order?

See the answer to question 46 above.

60. Who conducted the technical studies mentioned in paragraph 42 of the hypothetical case?

The technical studies were conducted by the Department of the Environment, in coordination with the other departments of the government with mandates related to the concession of mining projects in indigenous territories in Santa Clara, namely: the Ministry of Energy and Mines, the Federal Water Authority, and the Office of the Undersecretary for Intercultural Affairs.

61. Did Edmundo Camana’s activities as president of the MCM in any way involve the Madruga subsidiaries of Miningcorp and Silverfield?

As president of the Madruga Confederation of Mineworkers, Edmundo Camana had denounced the labor conditions created by personnel from the Miningcorp and Silverfield subsidiaries in Madruga. He also led campaigns alerting the public to the potential links between mining companies in the northern part of the country and the murder of trade union leaders by unlawful armed militias.

62. Has the State implemented programs to monitor and oversee the construction works of the Wirikuya project, and have they resulted in the imposition of penalties against Silverfield for the contamination of Pampulla Lake?

See the answer to question 14 above.

63. In addition to the “Law of Extraterritorial Jurisdiction over Corruption and Human Trafficking,” is there any treaty between Santa Clara and Madruga that authorizes both States to adjudicate criminal cases involving acts committed outside their territorial jurisdiction?

See the answer to question 23 above. Both Santa Clara and the Republic of Madruga have ratified the Inter-American Convention against Corruption and the Inter-American Convention against Terrorism.

64. What was the content of the decision of the NAFTA permanent arbitration panel regarding the claim brought by Miningcorp against the State of Madruga?

The NAFTA Arbitral Dispute Resolution Panel dismissed the claim after it was withdrawn by Miningcorp S.A. The dismissal was finalized two months after the Superintendency of Banks and Insurance of Madruga shelved the administrative audit against Miningcorp S.A.

65. Does the Madruga law that provides for the Orífuna people’s decision-making process follow the cultural traditions of that population? According to those traditions, what is the

role and standing of the communal landholdings, the Orifuna People's Assembly, and its president?

See the answer to question 39 above.

- 66. Will the other 12 communal landholdings not located along the high valley and estuary of the Doce River be affected in any way by the Wirikuya project? Were the residents of those communal landholdings consulted about the project?**

The April 2008 report of the Office of the Undersecretary for Intercultural Affairs of Santa Clara stresses that the entire territory of the Orifuna people in Madrugá could be affected by the Wirikuya project, without specifying particular communal landholdings. The presidents of all of the communal Orifuna landholdings received visits and informational workshops from representatives of Silverfield S.A., but at no time did any government officials from Santa Clara or Madrugá approach them or announce meetings with them.