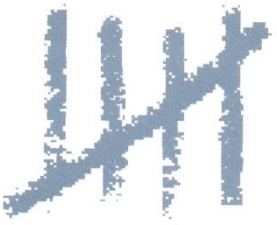

London, July 2011
Honorable Magistrado
JUAN CARLOS HENAO PEREZ
Corte Constitucional
Presidente

Referencia: solicitud de nulidad de sentencia 7-769/2009 de la Sala Séptima de Revisión de la Corte Constitucional

Amicus brief of the Bar Human Rights Committee of England and Wales

Introduction

1. This amicus brief is respectfully directed to the Court.

2. The brief is being lodged following an application to the Constitutional Court for the quashing of a judgment (T-769 of 2009; 29th October of 2009) of the Sala Séptima de Revisión of the Corte Constitutional, seeking the revision of that judgment by the full plenary of the Court.

3. This brief has been prepared on behalf of the Bar Human Rights Committee of England and Wales ("BHRC"). The Bar Human Rights Committee is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.

4. In the light of the judgment of the Sala Séptima and the application seeking its annulment, the authors of this brief seek to limit their comment to two issues:

(a) Whether it is possible to discern a need for prior consent before the commencement of major economic projects on land occupied by indigenous communities, in international practice;
(b) Whether importance is attached to the conduct of environmental studies to determine the likely impact on any major project prior to the commencement of any such project, or the granting of a commercial concession by the state.

Prior consent

5. Clearly, the authors of this brief would not seek to comment on the content or interpretation of the Court's jurisprudence. It notes the submission made in the Solicitud de nulidad lodged against the Court's judgment on behalf of Muriel Mining (a complaint that is also repeated in a solicitud on behalf of the Ministerio del Interior y de Justicia) that the approach in the Court's judgment in T-769/2009 exceeded requirement contained in the Court's earlier jurisprudence. In particular, the Sala Séptima's judgment had referred to a requirement for prior consent of communities affected by major mining or other economic projects to be conducted on their lands or territories.

6. This, it is said exceeded the requirements created by earlier jurisprudence. Earlier case law had created a requirement for proper consultation of indigenous communities affected by such projects; had required the state not to act in an arbitrary or authoritarian manner; but stopped short of a requirement for prior consent by indigenous communities on the land affected by such projects prior to their commencement.

7. That a requirement for proper consultation with indigenous communities affected by such projects does not appear be a matter that is in dispute.

8. The issue, then, is the extent to which a requirement for prior consent by indigenous communities who will see a direct effect on land occupied by them by the implementation of major projects, such as mining or mineral extraction, might be said to exist.

ILO Convention 169

9. The authors would note - and this can be discerned from authority cited in the body of the Sala Séptima's decision, and in the Solicitudes de nulidad lodged by both the Ministry Interior and Justice and Muriel Mining - that earlier decisions of the Constitutional Court drew extensively on the framework provided by ILO Convention C169[1].

10. The language of that Convention and the framework that it created tended to underscore a requirement for *consultation*: see, inter alia, Article 15 of the Convention, which provides:

> (1) The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
>
> (2) In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

11. In this context, it is important to recall that the position, as articulated by the United Nations *Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly some eight years later (resolution dated 13th September 2007)[2], as reflected in the text of that resolution, had moved beyond that position. According to Article 32 of that Convention:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States **shall consult and cooperate in good faith with the indigenous peoples** concerned through their own representative institutions **in order to**

[1] C169, Indigenous and Tribal Peoples Convention, adopted by the General Conference of the International Labour Organisation (ILO) at its 76th Session on 7th June 1989;
[2] Resolution 61/295; 107th Plenary Session of the UN General Assembly; 13th September 2007;

obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization of exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact (our emphasis)

The case of the Saramaka People

12. Reasoning in the Séptima Sala's decision drew on the important judgment of the Inter-American Court of Human Rights in the Case of the *Saramaka People v Suriname* (28th November 2007).

13. It should perhaps be noted that the Inter-American Court referred to Article 32 of the General Assembly's Resolution in its reasoning[3]. It also drew on an analysis of decisions by other international tribunals, including decisions of the Human Rights Committee and the views of the UN rapporteur.

14. The *Saramaka People* judgment provides an extensive analysis of the rights of Indigenous Communities within the framework of Article 21 of the Inter-American Convention (the right to the use and enjoyment of property), drawing on the Court's earlier case law on the position of indigenous and tribal communities. The Court recognised in its analysis that the relationship between competing entitlements by indigenous communities and the states's economic priorities was necessarily a complex one. It underscored, in the light of its earlier case law that the cultural and economic survival of indigenous and tribal communities depended on access to and the use of natural resources within their territories. There were essentially two elements two this. Firstly, access to resources necessary for the continuation of the traditional life and activities of those communities and integral to their identities. Secondly, economic projects might have such impact on the environment in the lands occupied by the particular community, that they would significantly impact on the community and its subsistence and economic activities (for example, access to clean water might be

[3] See *Saramaka People v Suriname* at para 131;

significantly affected by mining projects, with a consequent impact on agriculture, farming or fishing).

15. The Court recognised that the protection provided by Article 21 was not absolute:

> Although the Court recognizes the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival, said property rights, like many other rights recognized in the Convention, are subject to certain limitations and restrictions. In this sense, Article 21 of the Convention states that the "law may subordinate [the] use and enjoyment [of property] to the interest of society". Thus, the Court has previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society. In accordance with this Article, and the Court's jurisprudence, the State will be able to restrict, under certain circumstances, the Saramakas' property rights, including their rights to natural resources found on and within the territory.

16. The Court set out three conditions precedent for the implementation of a particular project[4]:

(a) The effective participation of the community affected 'in conformity with their customs and traditions, <u>regarding any development, investment, exploration or extraction plan</u> within the community's territory' [the Court's guidance in this regard is clear; the obligation exists at all stages, from exploration onwards, and is not limited to the final stages of any projects where the particular activity actually begins];

(b) That a reasonable benefit from any project could be guaranteed to the Community;

(c) The Third conditions was that the State must ensure 'that no concession will be issued within Saramaka territory **unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.'**

[4] See Para 129 of the Court's judgment;

17. So far as the issue of consultation and the possible requirement of consent of the affected community, the Court said [paras 133-137] (and the Court's analysis was clearly conscious of developments internationally in relation to the possible requirement for consent):

> First, the Court has stated that in ensuring the effective participation of members of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions (supra para. 129). This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the **Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community**, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. **The State must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily**. Finally, consultation should take account of the Saramaka people's traditional methods of decision-making.
>
> **Additionally, the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions**. The Court considers that the difference between "consultation" and "consent" in this context requires further analysis.
>
> In this sense, the U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has similarly observed that:
>
> > [w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. […] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.

Consequently, the U.N. Special Rapporteur determined that "[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects".

Other international bodies and organisations have similarly considered that, in certain circumstances, and in addition to other consultation mechanisms, States must obtain the consent of indigenous and tribal peoples to carry out large-scale development or investment projects that have a significant impact on the right of use and enjoyment of their ancestral territories.

Most importantly, the State has also recognised that the "level of consultation that is required is obviously a function of the nature and content of the rights of the Tribe in question." The Court agrees with the State and, furthermore, considers that, in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs. (our emphasis)

18. In considering the factual case before it, and the imposition of a logging concession within Saramaka territory, the Court re-iterated '... the question for the state is not whether to consult with the Saramaka people, but whether the state must also obtain their consent'.[5]

Consent: Other Examples of the approach taken internationally

19. In a decision from March 2009, the Human Rights Committee in *Ángela Poma Poma v Peru*[6], while conscious of the tension between the need for economic development and the protection of indigenous communities considered, where a particular project had resulted in significant degradation of the community's environment and the ability of that community to carry on with its traditional activities, that an obligation of prior consent existed. The Committee's approach, drawing on its own previous decisions and General Comments, closely echoes the *Saramaka* decision[7]:

[5] Judgment at para 147;
[6] Human Rights Committee; Communication 1457/2006; CCPR/C/95/D/1457/2006;
[7] See paras 7.4- 7.7;

The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.

In the present case, the question is whether the consequences of the water diversion authorized by the State party as far as llama-raising is concerned are such as to have a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she belongs. In this connection the Committee takes note of the author's allegations that thousands of head of livestock died because of the degradation of 10,000 hectares of Aymara pasture land - degradation caused as a direct result of the implementation of the Special Tacna Project during the 1990s - and that it has ruined her way of life and the economy of the community, forcing its members to abandon their land and their traditional economic activity. The Committee observes that those statements have not been challenged by the State party, which has done no more than justify the alleged legality of the construction of the Special Tacna Project wells.

In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.

In the present case, the Committee observes that neither the author nor the community to which she belongs was consulted at any time by the State party concerning the construction of the wells. **Moreover, the State did not require studies to be undertaken by a competent independent body in order to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimize the negative consequences and repair the harm done.** The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the State's action has substantively compromised the way of life and culture of the author, as a member of her community. The Committee concludes that the

> activities carried out by the State party violate the right of the author to enjoy her own culture together with the other members of her group, in accordance with article 27 of the Covenant. (our emphasis)

20. In Communication 155/96; *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, the African Commission on Human and Peoples' Rights was called upon to analyse the impact and environmental damage caused by oil exploitation in lands under the control of the Ogoni People in Ogoniland in Nigeria. The Commission found it necessary to embark upon a general analysis of a government's obligation under the African Charter[8]. One of the complaints made was that oil exploration had proceeded without consult of the communities affected[9].

21. The Commission stated:[10]

> Government compliance with the spirit of Articles 16 [the right to enjoy the best attainable state of physical and mental health] and 24 [the right to a general satisfactory environment] of the African Charter **must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities** exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities. (our emphasis)

22. Further, and in relation to the requirement for participation of affected communities in decision making, the Commission noted, in finding a violation of Article 21 of the African Convention, that Ogoni communities has not been involved in decisions affecting Ognoniland.[11]

23. In a Common law context, Canadian authority recognises that the obligation to consult will always exist. Further, there is a 'sliding scale' of obligations according to the extent of the interference with the rights of an affected

[8] Para 43-69;
[9] Para 6;
[10] Para 53;
[11] Para 55;

community, with a possible obligation to 'accommodate' the affected community and to change or amend the terms of proposed plans or projects[12] .

Prior Environmental Impact studies

24. So far as an obligation to conduct or allow prior environmental impact studies to be conducted, the authors of this brief limit themselves to the making of a few brief observations. The authors understand that briefs to the Court submitted by *Justicia y Paz* and the *Asociación Interamericana para la Defensa del Ambiente* contain extensive analysis of the conduct of such studies as a procedural requirement. The authors would note, as is clear from reference to the cases cited above, that the conduct of environmental studies is clearly a crucial element in the decision making process. Indeed, in *Saramaka*, the Court quite explicitly considered the conduct of such studies to be a fundamental obligation, and important at all stages, commencing with the exploration and surveying needed to assess the viability of a particular project. It must be manifest, in considering procedural obligations of consultation or consent of an affected community that such studies were bound to be necessary so that the Community understood *the impact* of any decision where a process of consultation was proceeding, or where consent had been sought.

Summary

25. In summary, and as briefly explained above:

(a) *Saramaka*, and other cases that have followed since, together with other opinion, such as that of the UN rapporteur cited in *Saramaka*; and the UN Declaration on the Rights of Indigenous Peoples, recognise as a minimum standard, a proper process of consultation of communities affected by development projects, such as that proposed by Muriel Mining. So far as projects which have a likely significant impact on indigenous communities, and on the environments in the lands that they occupy, the additional requirement, precisely because of the extent of that impact, may well be for prior consent to be given by the community concerned;

[12] See, inter alia, *Taku River Tinglit First Nation v British Columbia* [2004] 3 SCR 550 at para 25; *Delgamuukw v British Colombia* [1997] 3 SCR 1010; *Mikisew Cree Nation* [2005] 3 SCR 388;

(b) A requirement for consultation is likely to exist at all stages of the process, from initial exploration and consideration of the viability of a particular project onwards. The requirement that environmental impact studies be conducted is also a necessary element of the process from the initial stages of any project onwards. It is clearly a facet of the process by which communities understand the likely impact of a particular project; indeed *Saramaka* considered it to be a central requirement in such a process.

Dated: 29th July 2011 **Respectfully submitted,**

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